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School Law Bulletin

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Possible Surprises Ahead—Preclearance Under the 1965 Voting Rights Act

By Michael Crowell

In Alabama, voter registration offices would be open only on the first and third Mondays of the month. In Louisiana, a black applicant to vote might be asked to solve this puzzle: "Our Constitution has been changed—(a) by the President; (b) by the Congress and the people; (c) by the Supreme Court." In Mississippi, the voter registration application included seventeen personal identification questions and required the applicant to copy and interpret any section of the state constitution. Separate tables and lines were used for black and white registrants, one moving noticeably slower than the other. A black college graduate might fail a literacy test for miscalculating his age by one day. Blacks who did manage to register to vote would soon be victimized by purges of the rolls and re-registration requirements.[1]

Such was the state of affairs in most of the South 20 years ago, not to mention the violent retaliations taken against black voters and those who sought to help them register.

The efforts to keep blacks from voting succeeded. In Mississippi, the worst case, only about 6 per cent of eligible blacks were registered. In North Carolina, at the high end of the spectrum, only about a third of eligible blacks were registered.[2]

After years of violence, culminating in the historic march from Selma to Montgomery, Congress attempted to solve the problem by passing the Voting Rights Act of 1965.[3] Sections 2[4] and 5[5] are the heart of that legislation. Section 2 prohibits discrimination in the election process anywhere in the country. Recent amendments have made Section 2 an effective weapon against election systems that do not provide adequate minority representation. More on that later.

The other key part of the Act, and the principal subject of this article, is Section 5. It applies only to some jurisdictions. In places where literacy tests had been used and fewer than 50 per cent of eligible voters registered or voted in 1964, Section 5 suspended the use of literacy tests and authorized the appointment of federal examiners to register voters. The ban on literacy testing later was made permanent and nationwide,[6] and the number of covered jurisdictions was expanded.[7] Originally written to protect only racial minor-

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1. This description of barriers to registration is taken from *Climbing Jacob's Ladder* by Pat Watters and Reese Cleghorn (New York: Harcourt, Brace & World, Inc., 1967), pp. 121-24—a very readable account of the voter registration efforts in the South in the 1960s.

2. Accurate voter registration figures for the period before the Voting Rights Act are hard to find. One reliable source is Donald Matthews' "Negro Voter Registration in N.C. and the South," *University of North Carolina Newsletter* 50, no. 2 (Chapel Hill: Institute for Research in Social Science, 1968).

3. 42 U.S.C. §§ 1973 to 1973bb-1. A general review of the voting Rights Act and its impact in North Carolina may be found in Michael Crowell, "The Voting Rights Act in North Carolina—1984," *Popular Government* 50, no. 1 (Summer 1984).

4. 42 U.S.C. § 1973

5. *Id.* § 1973c.

6. The ban was made applicable throughout the country in 1970; in 1975 it was made permanent.

7. In 1970 Section 5 was extended to jurisdictions with fewer than 50 per cent of their voting-age population registered or voting in November 1968. The 1975 amendments extended Section 5 to jurisdictions with fewer than 50 per cent registered or voting in November 1972.

ities, these provisions later were rewritten to apply to several language minorities as well.[8]

More important, Section 5 also bars those "covered" jurisdictions from making any change in election procedures until the U.S. Attorney General or the U.S. District Court for the District of Columbia determines that the change is not intended to reduce and will not have the effect of reducing minority voting strength. This "preclearance" requirement was ignored for several years and then enforced only sporadically, but now it is being used extensively to alter election systems.

Each time the "temporary" provisions of Section 5 have been scheduled to expire, they have been given new life.[9] The current expiration date is 2009.

Other amendments to the Voting Rights Act since 1965 have lowered the voting age for federal elections to eighteen[10] (later made applicable to all elections by the Twenty-Sixth Amendment); permitted citizens to vote in presidential elections regardless of state residency requirements;[11] and given blind, disabled, and illiterate voters new rights to assistance at the polls.[12]

Coverage of Section 5

Section 5 originally applied to states and counties that used a literacy test and had fewer than 50 per cent of eligible citizens either registered or actually voting in the 1964 presidential election. The states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were all covered, and so were Honolulu County in Hawaii and 41 of North Carolina's 100 counties[13] (see map).

Subsequent amendments extended Section 5 to jurisdictions that failed to meet the 50 per cent test for the 1968 or 1972 elections. In 1975 the preclearance requirement was made applicable to jurisdictions that had significant language minorities—that is, 5 per cent or more of their population were American Indian, Asian American, Native Alaskan, or of Spanish heritage—and had less than half of the eligible citizens registered or voting.

Those changes mean that a preclearance requirement now applies for all the jurisdicitions named above—except Honolulu County, which is no longer covered—plus the states of Alaska and Arizona; selected counties in California, Florida, New York, and South Dakota; and selected towns and townships in Michigan and New Hampshire.[14]

Once a jurisdiction is covered by Section 5, all political subdivisions within that jurisdiction also are subject to the preclearance requirement.[15] If a whole state is covered, all counties and cities within the state must submit changes. If only the county is covered, all cities and special districts within it must comply.

What Must Be Submitted

Each of the originally covered jurisdictions must submit for preclearance "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" that is different from what was in effect on November 1, 1964.[16] For jurisdictions later brought under Section 5, the determinative date is either November 1, 1968, or November 1, 1972.

Just what is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" that must be submitted? In the early years of Section 5, some believed that only changes that directly and substantially affected voting qualifications or voting itself were subject to preclearance. That view has been rejected by the U.S. Justice Department and by the courts, and now it is clear that *any* change that might even indirectly—even in a minor way—affect voting is subject to preclearance.

In *Allen v. State Board of Elections*[17] the U.S. Supreme Court said, "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." Building on *Allen*, the Court has required preclearance of acts that changed from district to at-large

8. This change occurred in 1975. Another aspect of the language-minority provisions was to require election materials to be furnished in the native language in jurisdictions where the language minority constitutes more than 5 per cent of the voting-age population and where there is a below-average literacy rate.

9. Section 5 was enacted originally for five years. In 1970 it was extended another five years. The next extension, in 1975, was until 1982. The extension currently in force was enacted in 1982.

10. This change was part of the 1970 amendments.

11. These provisions, codified as 42 U.S.C. § 1973aa-1, were added in 1970.

12. The assistance provisions were added in 1982, to take effect January 1, 1984. They are codified as 42 U.S.C. § 1973aa-6.

13. One of those North Carolina counties, Wake, later was able to exempt itself from Section 5, leaving 40 counties in the state subject to Section 5.

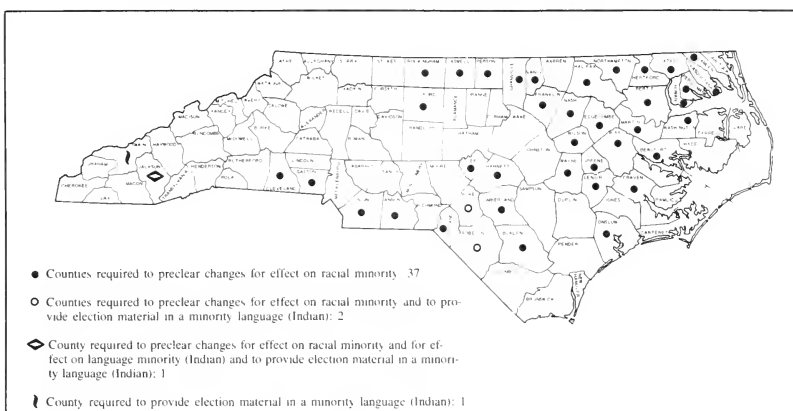
14. The full list of covered jurisdictions is included in an appendix to the U.S. Justice Department's regulations on Section 5, which constitute Part 51 of Title 28 of the Code of Federal Regulations (C.F.R.) The list in the 1985 edition still includes several jurisdictions that were covered at one time but are now exempt; these are counties and towns in Colorado, Connecticut, Idaho, Massachusetts, and Wyoming. A suit to exempt Alaska is pending.

15. 28 C.F.R. § 51.6. United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110 (1978).

16. 42 U.S.C. § 1973c.

17. 393 U.S. 554 at 566 (1969).

North Carolina Counties Subject to the Special Provisions of the Voting Rights Act



elections,[18] changed locations of polling places,[19] reapportioned legislative bodies,[20] required employees to take leaves of absence in order to become candidates,[21] and annexed territory to a city.[22]

The Department of Justice regulations express well the Department's expansive view of the kinds of changes subject to preclearance. Its list[23] includes changes in any of the following:

—Qualifications or eligibility for voting (e.g., age or residency).
—Registration or assistance in registration (e.g., hours the election office is open, persons qualified to register voters).
—Counting of ballots (e.g., rules on write-ins, presence of observers).
—Precinct boundaries or location of polling places.
—Boundaries of voting units (e.g., redistricting, annexation, switching from district to at-large election method).
—Method of determining outcome (e.g., switch to majority-vote requirement, designated seats).
—Eligibility for office (e.g., age, filing fee).
—Need for or methods for holding referendums (e.g., petition requirements).
—Term of office (e.g., length of term, switch to staggered terms).
—Right to participate in election campaign (e.g., a school board rule restricting political activity of employees).

This list is only illustrative. The Department of Justice view is that "Any change affecting voting even though it appears to be minor or indirect, even though it ostensibly expands voting rights . . . must meet the Section 5 preclearance requirement."[24]

Preclearance is required whether the change comes about through legislative enactment or through a mere change in policy.[25] A change in registration hours must be submitted whether adopted as a result of a change in state law or

18. Perkins v. Matthews, 400 U.S. 379 (1971); United States v. Sheffield Bd. of Comm'rs, 435 U.S. 110 (1978).

19. Perkins v. Matthews, 400 U.S. 379, (1971)

20. Georgia v. United States, 411 U.S. 526 (1973).

21. Dougherty County, Georgia, Bd. of Educ. v. White, 439 U.S. 32 (1978).

22. City of Richmond v. United States, 422 U.S. 358 (1975).

23. 28 C.F.R. § 51.12.

24. *Id.* § 51.11.

25. The change challenged in Doughtery County, Georgia, Bd. of Educ. v. White, 439 U.S. 32 (1978), was a school board rule requiring employees of the school system to take leaves of absence to run for public office. One of the changes challenged in Perkins v. Matthews, 400 U.S. 379 (1971), was an election board's decision to relocate a polling place. Indeed, the regulations even require changes to be submitted by political parties when the change concerns the party's "public electoral function" and the party is acting pursuant to authority granted by a covered jurisdiction. 28 C.F.R. § 51.7. Thus party rules affecting participation in a primary might be subject to preclearance, though changes in a party platform would not

merely as an administrative decision of the local board of elections. A new policy banning distribution of candidates' brochures on school property must be submitted, whether mandated by the state legislature or by announcement of the school superintendent.

The Chances of Receiving Preclearance

Almost all preclearance is by submission to the U.S. Justice Department rather than to the U.S. District Court for the District of Columbia, and almost all submissions are approved. Of the 65,000 changes submitted to the Justice Department through late 1983, only 518 drew objections.[26] What those numbers prove is that most changes submitted are inconsequential. A routine increase in voter registration hours, a pay increase for an elected office, a change in the primary date—these common occurrences are unlikely to draw objection in the absence of an obvious discriminatory purpose. But major changes in election methods—redistricting, annexations, consolidations, introduction of staggered terms, replacement of single-member districts with at-large elections—have much greater potential for affecting minority political strength and will receive close scrutiny.[27]

Procedure for Submission

The procedures to be followed in submitting changes to the Justice Department are spelled out in its regulations. Only a general outline will be attempted here.

The submission must be in writing,[28] and it should be made as soon as possible after the change has been decided on.[29] The Voting Rights Act itself provides that a change may not be enforced until it is precleared.[30]

The regulations make the "chief legal officer or other appropriate official" of the body making the change responsible for the submission.[31] The 1985 General Assembly clarified responsibility for this function in North Carolina.[32] By state law, the State Board of Elections now submits statewide changes in election law; the Administrative Officer of the Courts submits changes affecting judicial offices; the county or city attorney submits local acts, ordinances, or policies affecting only one covered county or city; and the school board attorney submits local acts or school board policies that effect a change for only that one school system.

No particular form is required for the submission. The regulations say what the submission should contain,[33] most of which is self-evident. The list includes:

—A copy of the law, ordinance, or policy that makes the change.
—A statement of what the change is.
—The name of the body that is making the change.
—The authority under which the change is to be made.
—When the change was made and when it is to take effect.
—A statement that the change is not yet being enforced, or why it is already being enforced.
—The reasons for the change.
—The expected effect of the change on protected minorities.
—Identification of any past or present litigation with regard to the change.

The following information is not required with each submission but should be provided as part of the initial submission when appropriate:[34]

—Population and voter registration statistics, by race.
—Maps showing any changes in election district or precinct boundaries, marked to show the locations of minority groups.
—Recent election returns showing the race of each candidate and the results for the total election unit and for each precinct.
—Newspaper articles, published notices, copies of speeches, board minutes, and any other information showing the publicity given to the change and the nature of the debate.
—Names, addresses, and telephone numbers of members of the minority community who are active politically and are familiar with the change.

If there is any chance that information on this second list is relevant and it is not included in the initial submission, the Justice Department will request it.

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26. *Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965* (Washington, D.C.: U.S. Department of Justice, Civil Rights Division, November 30, 1983). For North Carolina, the 2,001 changes submitted through 1983 had drawn 24 objections affecting 74 changes (36 involved annexations in one city, Rocky Mount).

27. For North Carolina, the most common objections have been to legislative redistrictings, annexations, and changes in the method of election (implementation of staggered terms, switch to at-large elections, etc.).

28. 28 C.F.R. § 51.18.

29. *Id.* § 51.19. Changes submitted before they become final will not be considered. *Id.* § 51.20. Justice Department lawyers will discuss pending changes, and such discussions may expedite formal consideration when the change becomes final.

30. 42 U.S.C. § 1973c.

31. 28 C.F.R. § 51.21(a). If more than one covered county or city is affected by the change, the submission may be made by the state.

32. N.C. Gen. Stat. Ch. 120, 6 A.I.

33. 28 C.F.R. § 51.25.

34. As the regulation says, the Attorney General's review "will be facilitated" if this additional information is submitted "where pertinent." *Id.* § 51.26.

The Attorney General has 60 calendar days from the day the submission is received to decide whether to object to the change.[35] Failure to respond within 60 days constitutes preclearance.[36] But if the submission lacks any information required by the regulations, the 60 days does not begin to run until the missing data are delivered.[37] In virtually all complicated cases, the Justice Department will notify the person who made the submission that additional information is required, usually the kind included in the second list. The 60-day deadline then is counted from when the missing data are provided, assuming they are complete. The Justice Department may extend the review period only once by requesting additional information.[38]

It is useful to remember that Justice Department personnel generally are responsible for processing tons of paper. If a submission is anything other than a routine, minor matter, it probably will be worthwhile to visit Washington and talk with the attorney assigned to the case. An early meeting can help identify the kinds of questions the Justice Department is likely to raise and offers an opportunity to provide background information that may help increase the Department's understanding of the case.

Though the regulations provide for expedited consideration[39] and though the Justice Department personnel will attempt to honor such requests, the volume of their work generally means that the response comes on the sixtieth day. If that day is Saturday, Sunday, or a federal holiday, the next regular business day is the deadline.[40] The Department can meet the deadline by putting its response in the mail by that time.[41] Usually notification also is given by telephone.

The submission is public, and any interested person may comment on it.[42] On request, these comments of others may be kept confidential within the limits of the Freedom of Information Act.[43] The Justice Department keeps a mailing list of people who wish to be notified of submissions.[44] Sometimes the Department will solicit written comments from members of the minority community.[45] As a matter of routine, knowledgeable minority-group members are called for information.

When a school board or other submitting authority becomes aware of comments made by others, it may wish to respond. In deciding whether to do so, however, the attorney should keep in mind the regulation on supplementary submissions. That is, any time a submitting authority provides additional documents or information "materially supplementing" a submission, the sixty-day period begins to run anew.[46] Therefore, if someone opposed to the change has made charges that were not addressed in the original submission, the submitting attorney will want to weigh the value of responding against the disadvantage of extending for another two months the time before the Justice Department gives a conclusory answer.

Changes in election procedure that were not precleared when they were implemented remain subject to the preclearance requirement indefinitely. As a result, a number of surprise consequences may follow when suit is filed to enjoin continued enforcement of the change.

35. 42 U.S.C. § 1973c; 28 C.F.R. § 51.8(a).

36. 28 C.F.R. § 51.41.

37. *Id.* § 51.35.

38. Garcia v. Uvalde County, 455 F. Supp. 101 (W.D. Tex. 1978), *aff'd*, 439 U.S. 1059.

39. 28 C.F.R. § 51.32. The regulation says the submission should explain why the change must be implemented sooner than sixty days and should state when an answer is needed.

40. 28 C.F.R. § 51.8(c).

41. *Id.*

42. *Id.* §§ 51.27, 51.49.

43. *Id.* § 51.27.

44. *Id.* § 51.30. Any person will by request be placed on the Registry. Those on the Registry are sent weekly notice of new submissions. *Id.* § 51.31.

45. The regulations authorize the Justice Department to contact any interested groups or individuals. It also may publish notice soliciting comments. 28 C.F.R. § 51.36.

46. *Id.* § 51.37. The courts will give great weight to the Justice Department's determination that the additional information constitutes a supplementary submission. An example of the Justice Department's being given another 60 days because the submitting authority responded to allegations in comments filed by a private party may be found in Lucas v. Bolivar County, 567 F. Supp. 433 (N.D. Miss. 1983).

Standard for Preclearance

In deciding whether to object to a change, the Attorney General is considering whether the change is being made for the purpose, or will have the effect, of denying or abridging the right to vote on account of race. A racially discriminatory purpose will automatically be objected to.[47] Such a purpose is seen less and less often, and generally the issue for the Justice Department is whether the change will have a discriminatory effect.

The basic test for discriminatory effect is the retrogression test contained in *Beer v. United States*.[48] Stated simply, the issue under Section 5 is whether members of the protected minority will be worse off after the change. Will a proposed change to staggered terms make it harder to elect blacks to the school board? Will a proposed increase in the size of the board enhance or diminish the chances of minority candidates?

The burden is on the person who submits the change to show that it does not violate Section 5.[49]

Last year the Justice Department published proposed new regulations that included additional information on the standards to be used in deciding whether to object to a change in election procedure.[50] Although the proposal has been criticized by civil rights groups and may not be adopted in the form originally presented, for the most part it describes the Department's present practices.

The proposal states clearly that the Justice Department will object to a change that passes the Section 5 tests but is discriminatory under the Fifteenth Amendment or under Section 2 of the Voting Rights Act (see below). The proposal specifies that the following factors are particularly important in evaluating a submission:

—Whether there is a reasonable and legitimate justification for the change.

—The extent to which members of the minority group had a chance to participate in the process leading to the change.

—The extent to which the submitting authority departed from "objective guidelines and fair and conventional procedures" in making the change.

The proposed regulations go on to list factors of particular interest when certain types of changes are submitted. In redistricting cases, for example, one important consideration is whether the body that is drawing the new lines rejected alternative plans that would have provided greater minority voting strength. For changes in electoral systems—for example, a switch from district to at-large elections, or introduction of staggered terms—the Justice Department is especially interested in whether there is a history of racially polarized voting in the jurisdiction, what alternative plans were rejected, the opportunities the minority group has had to participate in the political process, and the continuing effects of past discrimination as shown in registration and voting rates.

After an Objection

When the Attorney General objects to a change, his letter of objection will specify the reasons, though usually only in general terms. At that point the submitting authority has several choices. It may simply abandon the change. Or it may ask the Justice Department to reconsider the objection; an answer on the reconsideration will be given within 60 days of the request.[51] Or, if only a portion of the submission drew an objection (for example, changes in the length of terms are approved but the introduction of staggered terms is not), the submitting authority may consider new legislation designed to eliminate the objectionable feature. Finally, the submitting authority may go to court. Just as could have been done initially, the change may be submitted to the U.S. District Court for the District of Columbia for preclearance. Although this action is not an appeal from the Attorney General's decision, the Justice Department's evaluation of the issue will carry weight with the court.[52]

In most instances an objection from the Justice Department results in intense negotiations with members of the minority group who opposed the change and eventual adop-

47. City of Richmond v. United States, 422 U.S. 358 (1975).

48. 425 U.S. 130, 140-42 (1976). The *Beer* test was upheld in Lockhart v. United States, 460 U.S. 125 (1983). In that case, the addition of two members to the city council, running at different times from the other members, was held not to violate Section 5. The change did not affect the election for the existing seats. Although the city's election system, even before the change, could be considered discriminatory, "[s]ince the new plan did not increase the degree of discrimination, it was entitled to § 5 preclearance." *Id.* at 134.

The *Beer* retrogression test has been criticized as inadequate. See, for example, Hiroshi Motomura, "Preclearance Under Section Five of the Voting Rights Act," *North Carolina Law Review*, 61 (January 1983), 189.

49. 28 C.F.R. § 51.39(c); Rome v. United States, 446 U.S. 150 (1980). The regulations state that if it is unclear whether a change has a discriminatory purpose or effect, the Attorney General will object because of the submitting authority's failure to meet its burden.

50. The proposal was published in the 50 Fed. Reg. 19122-34 (May 6, 1985), to be codified at 28 C.F.R. §§ 50.1 to 50.65.

51. 28 C.F.R. §§ 51.44-51.47. The request for reconsideration may be made at any time. Notice of the request will be given to all who commented on or requested notice of action on the original submission.

52. "Given the central role of the Attorney General in formulating and implementing § 5, [his] interpretation of its scope is entitled to particular deference." Dougherty County, Georgia, Bd. of Educ. v. White, 439 U.S. 32 at 39 (1978).

tion of an alternative that satisfies their objections. Of course, any such agreement itself must be submitted for preclearance.

Failure to Submit

An increasingly common problem in North Carolina is the discovery of changes in election procedure made many years ago that were never submitted for preclearance. As a result, elections have been delayed in several covered counties. Most recently, elections of superior court judges have been postponed throughout the state because a 1965 change in state law and several later acts never were precleared.[53]

The Voting Rights Act and the Justice Department's regulations provide that a change cannot take effect until precleared.[54] Because there is no cutoff date, any change made since November 1, 1964—or 1968 or 1972, depending on the operative date for the particular covered jurisdiction—that has not been submitted remains subject to challenge.

In the early years of Section 5, there was confusion over what kinds of changes had to be submitted, and the Justice Department was more interested in enforcing other provisions of the Voting Rights Act. And in North Carolina, with only some counties covered by Section 5, no single official was responsible for submissions. The result was that for a number of years few changes were submitted. In 1969, for example, the Justice Department received only 134 submissions from all covered jurisdictions nationwide. None came from North Carolina that year, as indeed was true in each year from passage of Section 5 in 1965 until 1970. The experience was similar for other states. In 1982, by contrast, the Justice Department received over 14,000 submissions.[55]

Obviously, then, a great many changes have never been submitted. Once it is discovered that a change should have been submitted but was not, the United States Attorney General or any interested person may sue in federal district court to have further enforcement of the change enjoined until Section 5 is complied with.[56] The issue in such cases is only whether a change occurred that should have been submitted, not whether—once submitted—the change is likely to draw an objection. If the change was significant (say, a doubling of the size of the school board in 1968), a sudden challenge to its validity years later can be highly disruptive. At a minimum, the threat of a lawsuit to enjoin further use of the change until it is precleared can provide a significant bargaining point for a group that wants other changes in the school system.

Remedies

When a change is submitted and it is concluded that it does violate Section 5, the remedy usually is prospective only. Generally, a court will not set aside elections held under the unprecleared change but will enjoin only future enforcement of the change.[57] An election could be set aside, however, if such a remedy should be necessary to prevent intentional disregard for Section 5.[58]

Berry v. Doles[59] illustrates the Supreme Court's approach to remedies. Because the change to staggered terms had been in effect for almost eight years without challenge, the district court refused a last-minute request to enjoin a 1976 election in Georgia and then later refused to set aside that election. The Supreme Court upheld the district court decision but gave the county thirty days to submit the change for preclearance. The Court went on to say that if the change to staggered terms was objected to by the Justice Department, the plaintiffs could return to the trial court and request that the terms for two seats be cut short in order that all seats could be elected simultaneously at the next regularly scheduled election.

Bail Out

It has always been possible, theoretically, for a jurisdiction to remove itself from coverage of Section 5,[60] but until recently a state or county could "bail out" only by showing that it had not used a literacy or other test in a discriminatory manner since before Congress suspended such tests in 1965. Only one of the 41 originally covered North Carolina counties (Wake) relieved itself of preclearance in this manner.

In August 1984, the rules for bail-out changed. Now, in order to exempt itself from Section 5, a covered jurisdic-

53. Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985). A 1965 numbered-seat law was never precleared, and its enforcement was enjoined pending submission and approval. Also enjoined were various other acts that created new judgeships and split districts. The state has appealed the federal district court's decision that acts affecting judicial offices are subject to Section 5.

54. 42 U.S. Code § 1973c; 28 C.F.R. §§ 51.2, 51.9.

55. These statistics are from the U.S. Justice Department reports cited in footnote 26.

56. 42 U.S.C. § 1973; 28 C.F.R. § 51.51; Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

57. Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

58. Perkins v. Matthews, 400 U.S. 379 (1971).

59. 438 U.S. 190 (1978).

60. The bail-out provisions are codified in 42 U.S.C. § 1973b. A fuller discussion of bail-out may be found in Carolin Bakewell and Michael Crowell, "The 1982 Amendments to the Voting Rights Act," *Local Government Law Bulletin* No. 24 (Chapel Hill, N.C.: Institute of Government, March 1983).

tion must show that for the preceding ten years each of the following is true:

—The jurisdiction has not used a discriminatory voting test.
—It has not been found in violation of the Voting Rights Act.
—No federal examiners have been appointed for the jurisdiction.
—All election changes have been submitted for preclearance.
—No change has been successfully objected to.
—All discriminatory election procedures have been eliminated.
—Positive steps have been taken to increase minority participation in elections, as demonstrated by registration and voting statistics.

Clearly, the most difficult test to meet will be that all changes have been submitted for preclearance. Because the test is only for the preceding ten years, however, the goal is certainly attainable. And the possibility of bail-out provides a strong incentive for complying with preclearance requirements.

If an entire state is covered by Section 5, an individual county may seek to bail out separately. Cities, however, may not bail out on their own.

Bail-out is accomplished by a lawsuit brought against the United States, to be heard by a three-judge panel of the U.S. District Court for the District of Columbia. The jurisdiction that seeks to bail out must publicize its action, and private citizens may intervene in the lawsuit to protest the bail-out.

Section 2

As noted above, in a preclearance review the Justice Department may be considering whether the change results in a violation of Section 2 of the Voting Rights Act. And a separate Section 2 lawsuit may be brought against any jurisdiction, whether or not it is covered by Section 5.

Before 1982, as a result of *Mobile v. Bolden*,[61] an election system violated Section 2 only if it was adopted for the purpose of discrimination. Even though the substantial racial minority in Mobile, Alabama, had been unable to elect blacks to the city council under the at-large election system, the Supreme Court held that there was no Section 2 violation unless it could be shown that the at-large method of election had been adopted with a discriminatory intent. It was not relevant that fairer representation of blacks could be accomplished by use of a ward or district system with several predominately black districts.

Congress reversed this rule with its 1982 amendments providing that a Section 2 violation could be shown by discriminatory effect as well as purpose.[62] The lawmakers then went a step further and said that the election method in issue should not be judged in isolation but must be viewed in context of other circumstances that might affect minority voting. Thus in a Section 2 lawsuit it is relevant to show for the jurisdiction:

In 40 North Carolina counties any change in election procedure, no matter how small, that affects minority voting strength must be cleared in advance with federal authorities.

—Whether there is a history of official racial discrimination in the election process.
—The extent to which voting is polarized by race.
—The extent to which other aspects of the election system (for example, in North Carolina the majority-vote requirement) contribute to the opportunity for discrimination.
—The extent to which the minority group still bears the effects of discrimination in such areas as health, education, and employment and thus is still disadvantaged in participating in the political process.
—The use of racial appeals in campaigns.
—How successful (or unsuccessful) minority groups have been in electing candidates.

With the opportunity to use so much evidence derived from past discrimination, proof of a Section 2 violation becomes easier. The potential impact can be seen in the suit challenging North Carolina's most recent attempt at leg-

61. 446 U.S. 55 (1980).

62. A fuller discussion of the 1982 amendments may be found in the article cited in footnote 60.

islative redistricting.[63] At issue is whether in particular districts the election of several legislators on an at-large basis denies blacks an equal opportunity to elect candidates of their choice in violation of Section 2. With strong evidence of all the vestiges of past discrimination listed above, the federal district court found discrimination and ordered that the multi-member districts be carved into several single-member districts, some of which would have predominately black populations.

The legislative districting case is on appeal to the Supreme Court and could provide the first significant interpretation of amended Section 2. Meanwhile, the plaintiffs' success in that case has spawned lawsuits throughout the state challenging the at-large method of election used for boards of county commissioners, city councils, and school boards. The evidence gathered and introduced in the legislative suit, supplemented by statistics on local elections, can be used by plaintiffs in almost all parts of the state.

Summary

The 1965 Voting Rights Act had an immediate, dramatic impact throughout the South. Blacks went to register and vote with new protections. When they still met resistance, federal officials were on hand to replace local registration officials. As a result, minority-group members now are free to vote and run for office throughout the country.

Attention now has shifted to how effective that minority voting strength is and should be. Longstanding features of election systems that keep minorities from effectively exercising their political strength are subject to challenge in Section 2 lawsuits. The 1982 amendments have made that part of the Act an effective weapon for challenging at-large elections, staggered terms, and other election systems that tend to submerge black voters.

Knowing the resistance that would meet efforts to increase black voting, Congress also passed Section 5, barring certain states and counties from making changes in election procedure unless first reviewed by the U.S. Attorney General. Congress anticipated that without such a requirement, each time a voting barrier was struck down by the courts it would be replaced with a slightly different method of keeping blacks out of the voting booth.

The preclearance provisions of Section 5, applicable mostly in the South, were not at first the real strength of the Voting Rights Act. Approval was thought necessary only for changes in voting procedure that had a direct, immediate effect on blacks. But that view was too limited, and now Section 5 is construed to require submission of all charges affecting elections, no matter how remote the possibility of reducing black voting strength.

Years of neglect in making submissions, combined with a changing view of Section 5's scope, has created a minefield loaded with un-precleared changes. It is unlikely that any covered jurisdiction has submitted all the charges that have taken place in the last two decades. This situation provides an opportunity for minority groups to stop elections for many local offices until changes made 15 years or so ago are precleared. The threat of such a challenge, and the potential disruption of local elections, gives minorities substantial leverage in negotiating for alterations they would like to see. ■

63. Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984).

Handling Hazardous Chemicals: Safety Requirements for North Carolina School Personnel

By Charles Jeffress

Every public school system and public college in North Carolina will be affected this spring by new regulations governing the handling of hazardous chemicals. The state OSHA (Occupational Safety and Health Act) hazard communication standard[1] and the state Hazardous Chemicals Right to Know Act[2] both take effect for state and local government employers on May 25, 1986. Private schools must comply with the state law by that date but have until May 25, 1987, to comply with the OSHA standard.

While new hazardous chemical regulations are being implemented across the country, North Carolina has adopted a unique approach. By action of Commissioner of Labor John C. Brooks, the national OSHA standard for worker protection has been extended in North Carolina to cover all employers. Nationally it applies only to manufacturers. To complement Commissioner Brooks's action in the workplace, the General Assembly acted in 1985 to protect firefighters and the general public by requiring employers to release certain information on hazardous chemicals. Whether chemicals are found in school laboratories, in janitors' closets, in maintenance compounds, or anywhere else, the school or school system, as an employer, must comply with both sets of requirements.

A hazardous chemical is defined the same way in both the law and the OSHA standard as any chemical that is a physical hazard (e.g., explosive, flammable) or a health hazard (e.g., skin irritant, toxic agent, capable of causing lung damage). If hazardous chemicals are present in any amount, the OSHA standard applies. The state law applies only where an employer maintains 55 gallons or more of a hazardous chemical.

The law and the standard require the same basic document for conveying information about hazardous chemicals: the material safety data sheet, or MSDS. Among other information, the MSDS lists the name of the chemical, its hazards, precautions for safe handling, and emergency and first aid procedures. Each manufacturer of a hazardous chemical must provide an MSDS to all distributors or direct purchasers of that chemical, and distributors must in turn provide an MSDS to their customers. If a school system does not receive an MSDS when it purchases a hazardous chemical, it must request one from the supplier. If the document still has not arrived after 30 days, the State Department of Labor must be notified.

The OSHA Standard

The OSHA standard recognizes that laboratories, such as high school science labs, may contain very small quantities of a large number of hazardous chemicals, and it excludes laboratories from many of the general requirements. Areas like bus garages or maintenance compounds must be in compliance with the full standard.

The author is Assistant Commissioner of Labor. He assisted in the review and adoption of the state OSHA hazard communication standard and lobbied on the passage of the Hazardous Chemicals Right to Know Act.

1. 13 N.C.A.C. 7C.0101(a)(99).
2. N.C. GEN. STAT. §§ 95-173 through -218.

In laboratories, employers have requirements for maintaining container labels and MSDSs and for training employees. With respect to labels, the labels of incoming containers of hazardous chemicals must not be removed or defaced. The school system need not provide its own labels for any other laboratory containers, nor are teachers expected to label vials into which chemicals are poured. Whatever labels are put on containers by the distributor or manufacturer, however, must remain on those containers and be clearly legible.

Similarly, MSDSs that are supplied with incoming chemicals must be maintained so that they are readily accessible to employees who use the laboratory. Each laboratory will no doubt have its own system for filing the MSDSs, but each teacher who uses the laboratory needs to know how to find any MSDS.

Employees who use the laboratory (including teachers, aides, and student assistants, whether or not they are paid) are to be informed of the hazardous chemicals present, the location and availability of MSDSs, and the identity of any chemical with which they work. The employees must be trained in how to detect the presence or release of a hazardous chemical, the physical and health hazards of the chemicals, how to protect themselves from hazards, and how to read and understand the labels and MSDSs.

Schools must have written policies that describe how they will comply with the hazard communication standard. In schools where a single teacher is responsible for ordering the chemicals, receiving the shipments, stocking the storeroom, getting out chemicals for laboratory use, and cleaning up afterward, the written policy may simply be a description of the procedures to be used by that teacher. Where more than one teacher is involved, the written policy must show who is responsible for compliance with each portion of the standard.

Even though only one teacher may be involved and even though it may be that teacher's responsibility to see that the requirements are followed, it is still the employer's responsibility to assure compliance with the standard. The school principal or an appropriate school system official needs to ensure that the teacher is informed of the standard's requirements and takes appropriate action to implement the required procedures.

School system action may also be necessary where chemicals or MSDSs are shipped to a central purchasing office rather than to the person who uses the chemicals. In such a case, the school system must insure that a copy of the MSDS accompanies the chemical when it is sent from central purchasing to the person responsible for the chemical's use.

Beyond science laboratories, hazardous chemicals may also be found in schools in such places as vocational education workshops, janitor's closets and printshops, and in maintenance compounds—like bus garages and grounds-keeping storehouses—operated by school systems. In these areas, the rules that apply to laboratories must be followed as well as the following general requirements.

First, for each work area, the employer must keep a list of the hazardous chemicals in that work area. The employer must have an MSDS for each chemical on the list.

Second, all containers of hazardous chemicals must be properly labeled, not just incoming containers from suppliers. The only containers exempt from this requirement are portable containers that are filled by an employee for his own immediate use. Labels must include the identity of the chemical, appropriate hazard warnings, and the name and address of the chemical manufacturer.

Third, the written hazard communication program must describe how each group of employees will be trained, and a specific training program must be planned and conducted for all employees who may be exposed to hazardous chemicals.

Two modifications to the federal OSHA standard that North Carolina has adopted provide some relief to schools that use only small amounts of chemicals. If the school uses no carcinogenic chemicals and has less than two gallons or 20 pounds total inventory at any given time, its only responsibilities are to maintain incoming labels and material safety data sheets and to train employees. No written hazard communication program is required.

The second modification concerns consumer products. Any consumer product in quantities of five gallons or 50 pounds or less is excluded from the standard so long as the employee's use of the product does not expose him to the hazardous chemical to any greater degree than other users of the product are exposed. If the employer maintains more than five gallons or 50 pounds of the product, he must obtain an MSDS from the manufacturer and abide by the requirements of the standard.

The OSHA standard is enforced by the Division of Occupational Safety and Health of the North Carolina Department of Labor. Normal OSHA scheduling procedures, citation procedures, and appeal procedures are followed.

The Hazardous Chemicals Right to Know Act

The state Right to Know Law applies only to employers who maintain 55 gallons or 500 pounds or more of any ha-

(continued on page 17)

Lease-Purchase of Automobiles by North Carolina School Boards

By A. Fleming Bell, II

Under a recently enacted statute, North Carolina school boards now may acquire automobiles by means of a financing arrangement that has been popular for several years with North Carolina cities and counties: the installment purchase, or lease-purchase contract. Under an installment purchase arrangement, a governmental entity agrees with a seller of property to pay the purchase price of an item, along with interest, in a series of installments. The seller retains a security interest in the property being acquired in order to help insure that the buyer will make the agreed-on payments.

Specifically, the new law—Ch. 436 of the 1985 Session Laws—adds "Enter[ing] Lease Purchase Contracts for Automobiles" to the list of powers of local school boards found in G.S. 115C-47. The act also contains guidelines that a school board must follow in taking advantage of this new power. These provisions of Ch. 436 are codified as G.S. 115C-47(28). [The act also makes a conforming change in G.S. 115C-522(a), a statute that regulates school boards' contracts for acquiring supplies, equipment, and materials.]

Under G.S. 115C-47(28), the installment purchase contract must provide that there is "no recourse for default in payments under the contract other than return of the automobile." Also, according to the statute, "[t]he taxing power of any tax levying authority is not and may not be pledged directly or indirectly to secure any moneys due the seller."

Finally, in the unlikely event that a school board enters into a long-term (five years or more, including optional renewal periods) automobile lease-purchase agreement involving a substantial sum of money (principal and interest totaling the lesser of $500,000 or "a sum equal to one tenth of one percent . . . of the appraised value" of the property subject to taxation by the local government that supplies funding to the school board), it must be approved by the North Carolina Local Government Commission (LGC).[1]

School Boards' Authority to Enter into Lease-Purchase Contracts

School Boards' Authority in General

The authority granted by Ch. 436 is strictly limited. This act marks the first and only legislative authorization for North Carolina school boards to acquire property through

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1. Specifically, G.S. 115C-47(28) provides that automobile lease-purchase contracts of school boards are "subject to the provisions of Article 8 of Chapter 159 of the General Statutes, except for G.S. 159-148 (a)(4) and (b)(2)." Article 8 of G.S. Chapter 159 contains a procedure for the required Local Government Commission review and approval of contracts with certain characteristics. Those characteristics are set out in G.S. 159-148. In sum, any automobile lease-purchase agreement proposed by a school board that conforms to the size and duration requirements of G.S. 159-148(a) as quoted in the text meets the applicable standard and comes within the purview of the LGC under Article 8. [While the test provided in G.S. 159-148(a) for triggering LGC review has other parts besides those quoted, these other guidelines are all satisfied by any lease-purchase agreement of the type discussed here.]

a lease-purchase arrangement that involves the granting of a security interest in the property being acquired.[2]

Such specific enabling legislation is needed for lease-purchase schemes, since local governments in North Carolina have no inherent authority to mortgage or encumber public property.[3] A school board may give a security interest in property it owns or is acquiring or constructing only if it is given permission to do so by the state legislature. The General Assembly has not yet authorized school boards to acquire personal property other than automobiles through lease-purchase agreements—or to acquire real property or finance construction of buildings by this means.

Cooperative Arrangements with Counties

While school boards' authority to lease-purchase directly is limited to acquisition of automobiles, in some cases involving personal property a board of education might possibly overcome this limitation through a cooperative arrangement between the school board and the county. This alternative strategy should be mentioned briefly before we discuss some of the issues involved in automobile lease-purchases by school administrative units.

G.S. 160A-20 gives cities and counties in North Carolina general authority to "purchase real or personal property by installment contracts which create in the property purchased a security interest to secure payment of the purchase money." It is conceivable that a county might agree to enter into a lease-purchase contract for the acquisition of items needed by the school administrative unit and to make the required payments with funds that would otherwise be appropriated to the school system for capital outlay purposes. Such an arrangement would allow the school board (a) indirectly to take advantage of the county's broader lease-purchase powers, and (b) to receive the benefit of a lower, tax-exempt interest rate that, as the next section explains, may not be available to a school board acting on its own.

One potential impediment to such a contract is the requirement of G.S. 115C-522(a) that local boards of education "purchase or exchange all supplies, equipment and materials in accordance with contracts made by or with the approval of the Department of Administration"—that is, through state contracts. Whether this statute applies to the type of arrangement suggested in the preceding paragraph is unclear; it probably depends on the exact structure of the proposal being considered.

School officials who are investigating a cooperative lease-purchase effort with a county will also be interested in G.S. 160A-274. This statute gives broad authority to school administrative units, cities, counties, and other governmental units to sell, exchange, lease, or enter into joint-use agreements with each other concerning property they own.

The reader is cautioned that a lease-purchase scheme of the type described above, if it works at all, will probably be useful only for acquiring personal property. Any lease-purchase proposal of this sort that involves real estate will encounter at least three very difficult problems: the requirement in G.S. 115C-521(d) that boards of education not make construction or repair contracts for a school building unless they own in fee simple the site on which the building is located, cities' and counties' lack of authority to enter into lease-purchase contracts for construction of buildings,[4] and the absence of any statutory authorization for local school boards to own buildings encumbered by mortgages.

Some Issues Involved in Automobile Lease-Purchase Financing

School officials who are considering lease-purchase financing to acquire automobiles must confront at least two sets of issues. First, they need to be concerned with how the interest they pay on their lease-purchase obligations will be treated for federal income tax purposes. If the interest earned by the lender is treated as taxable income, a higher interest rate will be charged than if the interest is exempt from federal income taxes.

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2. A somewhat related act, Ch. 783 of the 1985 Session Laws (codified as amendments to G.S. 115C-441 and G.S. 115C-521), authorizes boards of education, with the county commissioners' permission, to enter into continuing multiyear contracts for capital outlay expenditures. While it can be argued that lease-purchase agreements are such continuing contracts [see A. Fleming Bell, II, "Lease-Purchase Agreements and North Carolina Local Governments," *Popular Government* 49, no. 4 (Spring 1984), 15], Ch. 783 should not be relied on as enabling authority for installment or lease-purchase agreements of the type being discussed here, since Ch. 783 does not authorize the granting of security interests in the property being acquired.

3. Vaughn v. Commissioners of Forsyth County, 118 N.C. 636, 640-42 (1896). Under "Dillon's Rule," a principle followed by North Carolina's courts in determining whether a local government has authority to engage in a specific activity, a school district or other unit of local government—as a creature of the state legislature—has only certain powers: (1) those granted to it by the legislature in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) (a type not relevant here) those essential to the unit's declared objects and purposes.

4. The limitations of cities' and counties' authority to lease-purchase real property are discussed in A. Fleming Bell, II, "Questions I'm Most Often Asked: To What Extent May North Carolina Cities and Counties Make Use of Lease-Purchase Financing in Real Estate Transactions?" *Popular Government* 51, no. 4 (Spring 1986), in press.

School boards will also have to make certain that their lease-purchase transactions are properly structured to comply with several different provisions of North Carolina law. Lease-purchase transactions tend to be complicated arrangements that require involvement of a knowledgeable attorney as early as possible in the property acquisition process.

This article can only highlight a few important points about each of these aspects of lease-purchase transactions. School officials who are exploring lease-purchase arrangements should also read carefully my article entitled "Lease-Purchase Agreements and North Carolina Local Governments," which appeared in *Popular Government* for Spring 1984.[5] That article describes in considerable detail the requirements that lease-purchase contracts must meet in order to comply with North Carolina law, and it discusses a number of contractual clauses commonly found in lease-purchase agreements. While it was written with cities and counties in mind, much of its information also applies to school boards that wish to use their authority under G.S. 115C-47(28), since many of the rules and precautions that must be observed are the same. Please also consult the section on "Further Reading" at the end of this article.

Federal Income Tax Questions

A correctly structured lease-purchase agreement involving a state or a "political subdivision" of a state is treated, for federal income tax purposes, in the same manner as a more conventional governmental "obligation," such as a bond issue; that is, the interest on the obligation is exempt from taxation under the Internal Revenue Code.[6] If this tax exemption is available to a financing institution, the lender will usually pass along some of its tax savings to the state or the political subdivision in the form of a lower interest rate. This lower financing cost is one major reason that cities and counties have found lease-purchasing an attractive option for acquiring equipment.[7] For a school board's lease-purchase transaction to qualify for this favored tax treatment, however, the school administrative unit must meet the Internal Revenue Service's definition of a "political subdivision" of a state. School districts in North Carolina are not likely to qualify, for the following reasons.

IRS regulations specify that a qualifying "political subdivision" must have been delegated the right to exercise part of the state's "sovereign power."[8] According to the IRS, "[t]hree generally acknowledged sovereign powers of states are the power to tax, the power of eminent domain, and the police power [citations omitted]." While "[i]t is not necessary that all three of these powers be delegated" to the unit, "possession of only an insubstantial amount of any or all sovereign powers is not sufficient. All of the facts and circumstances must be taken into consideration, including the public purposes of the entity and its control by a government."[9]

As North Carolina school officials are aware, school districts in this state have no taxing power, and school boards have been granted only limited police power with regard to school property. The only one of the three powers that North Carolina school boards possess to any appreciable extent is the power of eminent domain. G.S. 115C-517 authorizes local boards of education to condemn land under the provisions of G.S. Chapter 40A (the eminent domain law) if they are "unable to acquire or enlarge a suitable site or right-of-way for a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities by gift or purchase . . . ." No more than 50 acres may be condemned for any one site for a school facility.[10]

It is questionable whether having the power of eminent domain and a limited amount of police power is sufficient to make a school board a "political subdivision" for federal tax law purposes. A 1977 Revenue Ruling involving a state university may be instructive. In that ruling, the IRS determined that the university—which also had no taxing power and a similar degree of the police power but had somewhat less eminent domain power than North Carolina school boards do—did not qualify as a political subdivision within the meaning of the IRS regulations.[11]

If financial institutions have doubts about whether school districts in North Carolina qualify as state political

5. Bell, "Lease-Purchase Agreements," *supra* note 2.

6. *See* 26 U.S.C. § 103(a) and the accompanying regulations. For a good discussion of the federal income tax treatment of the interest paid by states and their political subdivisions under lease-purchase contracts, see A. J. Vogt, L. A. Cole, D. R. Duven, and S. H. Owen, Jr., *A Guide to Municipal Leasing, rev.* (Chicago: Governmental Finance Officers' Association, 1985), pp. 54-58. (Information on ordering this book appears in the "Further Reading" section of this article.)

7. A bill currently pending in the United States Senate—the Tax Reform Act of 1985 (H.R. 3838, 99th Cong., 1st Sess., 131 *Cong. Rec.* H 12579 [1985])—may change some of the rules governing tax-exempt lease-purchase transactions and may affect the interest rates that financial institutions, especially banks, charge for lease-purchase financing. This article does not deal with these proposals but addresses the federal tax law as it now exists.

8. Treas. Reg. § 1.103-1 (1972).

9. Rev. Rul. 77-164, 1977-1 C.B. 20, 21; Rev. Rul. 77-165, 1977-1 C.B. 21, 21.

10. The next to last paragraph of G.S. 40A-3(b) provides that boards of education "may exercise the power of eminent domain under [Chapter 40A] for purposes authorized by other statutes"—e.g., G.S. 115C-517.

11. Rev. Rul. 77-165, *supra* note 9, at 21.

subdivisions under IRS guidelines, they are not likely to make available to school boards the lower tax-exempt interest rates that are charged cities and counties when those units lease-purchase. School officials who are entering into automobile lease-purchase agreements should probably expect to pay higher interest charges on the assumption that the interest income earned by the financing institution is fully taxable.

Complying with Requirements of State Law

Two of the more important issues in state law that school officials must confront in arranging for the lease-purchase of automobiles are how to structure the basic transaction, especially if financing is being supplied by someone other than the automobile vendor, and how to meet the preaudit requirements of G.S. 115C-441(a).

Structuring the Lease-Purchase Transaction. G.S. 115C-47(28) contemplates a two-party transaction between the local board of education and a seller of automobiles. The school board agrees to pay the purchase price plus interest in a series of installments and, in order to secure those payments, grants a security interest in the automobiles to the seller. No money is lent or advanced by the seller to the school board. Such a structure makes it clear that the school board is not borrowing money when it enters into a lease-purchase transaction and avoids problems that might otherwise arise because of state constitutional restrictions on local government debt.[12] [The provision in G.S. 115C-47(28) forbidding any pledge of the taxing power of any tax-levying authority to secure payment of the money owed by the school board will also help in avoiding such constitutional difficulties.]

If the school board wishes to secure lease-purchase financing from a third-party financing institution such as a bank rather than from the automobile vendor, it can follow either of two other procedures. Both of these alternative schemes allow the use of third-party financing while maintaining a two-party transactional structure for purposes of G.S. 115C-47(28).

Option 1. The school board enters into an installment purchase agreement as described above with the automobile vendor, in which the board agrees to make a series of agreed-on principal and interest payments. The vendor then assigns its right to receive these payments to a bank or other financial institution, selected in advance by school officials or the vendor, in exchange for payment of the purchase price of the automobiles by the bank to the vendor. After the assignment, the school board makes its payments directly to the bank as the vendor's assignee. (The school board should make certain that its contract with the vendor is still in force with respect to matters other than payments, such as warranties.) This sort of arrangement, while simple and straightforward, is seldom seen in the marketplace—perhaps because banks like to enter into contracts directly with their obligors.

Option 2. The board of education agrees with the automobile vendor and the bank or other institution selected

School boards can now purchase automobiles by installment purchase, or lease-purchase, contracts that create a security interest in the property being purchased. Strict guidelines must be followed, however, and several important issues remain to be resolved. School boards are not permitted to lease-purchase other items of personal property on their own, although an indirect, cooperative arrangement with the county may be possible.

12. Bell, "Lease Purchase Agreements," *supra* note 2, at 11-12. *See generally* N.C. Const. art. V, § 4.

to supply the financing that the vendor will assign to the bank its right to sell the automobiles to the school board, in exchange for payment by the bank to the vendor of the automobiles' purchase price. This assignment of right to sell and payment actually takes place after the automobiles are delivered to and found acceptable by the board. In this case, the bank "stands in the shoes" of the selected automobile vendor for purposes of the competitive bidding laws and is permitted to sell the automobiles to the school board as the vendor's assignee. The required two-party nature of the transaction is preserved, since the school board technically "buys" the automobiles from the bank, the same entity to which it grants a security interest in the cars.[13]

It is usual under Option 2 for title to the automobiles to be conveyed directly from the vendor to the governmental purchaser, because of the difficulty of rapidly transferring title from vendor to bank to buyer.[14] Even if such a vendor-buyer title transfer is used, however, it is still very important—as the preceding paragraph said—for the vendor to assign to the bank its right to sell the automobiles to the governmental buyer.[15]

If Option 2 is used, school officials should also be sure to obtain an agreement from the automobile vendor that any warranties made by the vendor are for the benefit of and can be enforced by the school board, despite the vendor's assignment to the bank of its right to sell the automobiles to the school administrative unit. Because the school board technically is buying the automobiles from the bank rather than from the vendor, it needs such an agreement so as to be entitled to the warranties that the vendor normally makes only to its immediate purchaser.[16]

Preaudit Requirements. G.S. 115C-441(a) requires the school finance officer to preaudit each obligation that the school administrative unit proposes to incur, certifying that sufficient funds have been appropriated and are available to pay the sums obligated by the transaction for the current fiscal year. If the school board enters into an installment purchase arrangement directly with the automobile vendor, it will be apparent from the face of the lease-purchase agreement what sums the school board is obligating itself to pay during each fiscal year, and the finance officer should have little difficulty in certifying whether sufficient funds are available to make the current year's payments.

If Option 2 outlined above is used, however, the school board must make clear in its agreement with the vendor that the purchase of the automobiles is contingent on the securing of satisfactory lease-purchase financing from a third party and that the school board is committing itself in this fiscal year only to the extent of the payments that will come due under that lease-purchase financing contract during the year. If the school board's contract with the automobile vendor does not mention the planned lease-purchase financing, it will appear that the board itself plans to pay the full cost of the automobiles in the year that they are purchased, and the full purchase price of the automobiles will have to be appropriated and encumbered.[17]

Working with the Department of Administration. Resolving the issues just discussed is complicated by the fact that boards of education in North Carolina must buy their automobiles "in accordance with contracts made by or with the approval of the North Carolina Department of Administration," under the provisions of G.S. 115C-522(a). A school board that is planning to use lease-purchase financing to acquire automobiles must alert both the Department of Administration and potential bidders on the automobile procurement proposals administered by the Department that the board is considering lease-purchase financing and that the vendor selected by the state will need to agree with the board to special contractual terms concerning assignments, warranties, and the like that address the issues outlined above.

Other Issues. A number of other subjects with which school officials interested in automobile lease-purchases must be concerned are addressed in "Lease-Purchase Agreements and North Carolina Local Governments"[18] and in the other publications listed in the next section. These include, for example, the details of requirements for approval by the Local Government Commission for large, longer-term lease-purchase transactions; registration systems for assignments of contractual rights by financing institutions and requirements of LGC approval of such systems; contractual

13. For more details on this type of transaction, see Bell, "Lease-Purchase Agreements," *supra* note 2, at 12-13, 15.

14. The procedure involved in a title transfer by the owner of a motor vehicle is described in G.S. 20-72. *See also* G.S. 20-75.

15. This issue is discussed in more detail in A. Fleming Bell, II, *A Model Equipment Lease-Purchase and Security Agreement for North Carolina Local Governments, with Annotations and Appendices* (Chapel Hill, N.C.: Institute of Government, 1985), pp. 1-2, 8-9.

16. See Bell, "Lease-Purchase Agreements," *supra* note 2, at 16-17, for further discussion of this issue.

17. Preaudit requirements are also discussed in *ibid.*, pp. 12-13, and in n. 5 on page 12. (The discussion of preauditing in the *Popular Government* article assumes that two title transfers—vendor to bank and bank to local government lessee—will occur. As explained earlier, it is permissible in the case of motor vehicle lease-purchases for title instead to pass directly from the vendor to the school board or local government involved in the transaction.)

18. Bell, "Lease-Purchase," *supra* note 2.

clauses dealing with the possibility that funds will not be appropriated to make future installment payments; provisions concerning contractual defaults and remedies if default occurs; and the effect, if any, of competitive bidding laws on solicitation of financing proposals.

Further Reading

In addition to my article on lease-purchase financing already mentioned, school officials interested in this approach for acquiring automobiles should consult *A Model Equipment Lease-Purchase and Security Agreement for North Carolina Local Governments, with Annotations and Appendices*, a recent Institute of Government publication that contains a model lease-purchase contract with supporting documentation.[19] The detailed annotations and explanations in that book will help to answer many of the specific questions posed by lease-purchase financing arrangements. The Model Agreement includes, for example, some sample bid conditions and an example of an "Assignment of Right to Sell" document that can be adapted for use by boards of education. This book and my article are both available from the Institute.[20]

Another useful text on the subject of equipment lease-purchasing is *A Guide to Municipal Leasing*,[21] written in part by A. John Vogt of the Institute of Government faculty. It is available from the Governmental Finance Officers Association of the United States and Canada, 180 North Michigan Avenue, Suite 800, Chicago, Illinois 60601-7476. ■

19. Bell, *A Model Agreement*, *supra* note 15.

20. Write or call the Publications Office, Institute of Government, Knapp Building 059A, The University of North Carolina at Chapel Hill, Chapel Hill, N.C. 27514 Telephone 919-966-4119. The article is available free of charge; the price of the book is $10.00, plus sales tax of 3 per cent (4½% in Orange County).

21. Vogt et al., *A Guide to Municipal Leasing*, *supra* note 6.

Hazardous Chemicals *(continued from page 11)*

zardous chemical in any given facility. If a school building has no hazardous chemical in amounts over 55 gallons or 500 pounds, it is excluded from the requirements of the law. Very few, if any, schools in North Carolina maintain that quantity of hazardous chemicals.

But school systems generally will have gasoline stored in large tanks and may have drums of other chemicals such as weed killers, solvents, or industrial cleaners. In such cases, the system must maintain a list of the chemicals that exceed the 55 gallons/500 pounds limit, must have an MSDS for each chemical, must notify the local fire chief about the chemicals, and must provide information to citizens on request.

The list that must be kept must indicate the name of the chemical, where it is stored, and the volume in the following ranges:

—Class A, for quantities less than 55 gallons or 500 pounds (used only when the quantity in a given work area is less than the reportable amount but the overall quantity in the facility is greater than that limit);
—Class B, for quantities between 55 and 550 gallons or between 500 and 5,000 pounds;
—Class C, for quantities between 550 and 5,500 gallons or between 5,000 and 50,000 pounds; and
—Class D, for quantities greater than 5,500 gallons or 50,000 pounds.

In municipalities with over 10,000 people, this list must be given to the fire chief. In other areas, the fire chief must be notified that the list exists and must be given to him if he requests it.

In addition to the list, school systems must give the local chief the name and telephone number of an emergency contact. Upon his request, the chief must also be given copies of MSDSs and a pre-fire plan for emergencies. The chief has the right to inspect the facility to determine that the information given to him is accurate and useful.

The school system must give any person in North Carolina who requests the information in writing the names and volume (in ranges) of all chemicals stored above the minimum quantities and an MSDS for any of the chemicals.

Compliance with the Right to Know Act will be monitored by local fire chiefs. Any complaints about compliance will be investigated by the Commissioner of Labor, who has authority to assess monetary penalties against anyone violating the act.

Further information about the OSHA standard and the state law are available from the Division of Occupational Safety and Health, North Carolina Department of Labor, 214 West Jones Street, Raleigh, NC 27603. ■

The Legal Status of School Clubs

By Douglas S. Punger

A common feature in the educational and social life of almost every high school in America is the school club. Schools sponsor clubs for many reasons. Curriculum-related clubs—like the drama club, the journalism club, or the French club—offer students an opportunity to enrich and expand their educational experience in the basic curriculum areas. Student-interest clubs give students a chance to acquire skills and to explore subjects not taught in the regular curriculum—skiing or chess, for example. Service clubs like the Key Club provide a vehicle for students to serve their peers, their school, and their community. Although they differ in purpose, all school-sponsored clubs seek to enhance students' educational growth and social development.

This article will focus on the legal status of school clubs. Most of the articles written on the legal problems that arise in administering extracurricular activities[1] concentrate on interscholastic athletics and other school-initiated or school-directed activities that differ markedly from school clubs in the way they are organized and administered. In general, clubs are formed by students, whereas athletic teams and other student activities are created by adults for students. Most school clubs are administered by the officers and/or boards of directors elected by the student members of the organizations as opposed to being administered by coaches or faculty sponsors selected by school officials. While coaches and teachers are responsible for planning for and implementing football teams, school plays, field trips, and similar activities, clubs are allowed a certain autonomy in planning and implementing their own programs.

Still, there appears to be a tension or conflict over who actually is in charge of a school club—the students, the faculty adviser, or the principal. This article will examine that issue on several fronts. It will explore the management and control of club funds; the legality of clubs' contracting for the purchase of goods or services; the liability of the school or school officials for personal injuries or property damage resulting from club activities; and, finally, the authority of school officials to regulate clubs.

The most salient factor affecting all of these questions is the age of the club members. As will be explained below, the fact that most students are minors has a major impact on the legal status of school clubs.

A Club Is an Unincorporated Association

A club is an unincorporated association of people bound together for a common goal or purpose under a common name.[2] In common law, an unincorporated association is not a legal entity and has no legal status distinct from the

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1. J. Abbott, The Developing Case Law of Public School Extracurricular Activities, School Law in Contemporary Society (Topeka, KS. NOLPE, 1980), pp. 233-43; Wood & Ross, *Extracurricular Funds: Their Distinction, Delegation, and Disbursement*, 9 *NOLPE* School L.J. 108 (1981); Stern, Legal Issues in Extracurricular Education, 9 NOLPE School L.J. 142 (1981).

2. 6 Am. Jur. 2d, *Associations and Clubs* § 3 (1963); 1 Strong's N.C. Index 3d, *Associations* § 1 (1977).

persons who compose it.[3] By statute in some states, unincorporated associations have the status of legal entities and are empowered to contract, to acquire property, and to sue and be sued.[4] In North Carolina, unincorporated associations may sue and be sued in their common name pursuant to G.S. 1-69.1, but the statute does not affect the legal status of the association as being merely an aggregate of its members.[5]

A club is formed by the voluntary action of a number of people or students. It is actually a contractual relationship between and among the parties that binds the members together. The contract takes a variety of forms—a charter, articles of association, a constitution, and/or the bylaws of the association.[6] It is well established that a voluntary association may, without interference by the courts, draw up its own government and adopt its own rules, which the courts will enforce unless they are arbitrary, capricious, or against public policy.[7] The contract may establish the administrative structure of the organization, the powers and duties of its officers, the eligibility requirements and procedures for selecting new members, and the methods of operating the club.

In the absence of statutory authority, an unincorporated association has no capacity to enter into contracts or to acquire property.[8] Therefore, a contract entered into by a club's officers is not binding on or enforceable against the club, although it may be enforced against its officers or members personally. In general, associations formed to engage in business for a profit are treated like partnerships in their contractual relations with third parties; but clubs formed for moral, benevolent, social, or educational purposes frequently are not so treated.[9] Pecuniary liability on a contract may be enforced only by reason of the acts of the officers or members of such clubs. In other words, in many jurisdictions only those members who authorized or ratified the contract may be held liable on the contract.[10]

An unincorporated association or club is under the same legal duties and liabilities for a tort committed by its agents, servants, officers, or members as other individuals or groups. The individual members of a club are personally liable for the tortious acts they commit or participate in, or acts that they authorize or ratify.[11] Although club members are not partners in a legal sense, if a club pursues a course of conduct agreed on collectively, they become responsible not only for their own acts but also for the acts of each other. However, mere membership does not make all members liable for acts for their associates done without their knowledge and approval.[12]

These general principles of law apply in most jurisdictions to clubs and associations formed by adults. Rarely, if ever, are these rules applied to high school student groups. School officials routinely regulate the organizational structure and membership requirements of school-sponsored clubs. Third parties almost never sue a student club in tort or contract. They sue the school board, the principal, or the faculty adviser. Understanding the reasons for this disparity of treatment should lead to a better appreciation of the legal status of school clubs.

Management and Control of Club Finances

He who controls the purse strings frequently holds the power in the organization. For most unincorporated associations, the power of the purse is established and delegated to the club's officers or directors in the organization's charter or bylaws by consent of the members.

By tradition, custom, local regulation, or state law, the cash assets of student clubs normally are deposited in the school activity fund accounts under the supervision and control of the principal or faculty adviser.[13] The authority of local school officials to supervise, manage, and control club funds is based on one or more of the following legal theories:

1. Since club activities involve the use of public property and require the services of teachers paid by public money, any moneys raised by a club are public funds.[14]

2. As a condition for accepting the benefits of school sponsorship—i.e., the free use of school facilities, the free services of a faculty adviser, free advertisement in school publications, and the endorsement of the club's overall purpose by the school—the club agrees to grant local school officials the authority to supervise and control club assets.

3. School officials assume responsibility for club assets because the club members are minors and do not have the capacity to manage their financial affairs themselves.

3. 6 Am. Jur. 2d, *Associations and Clubs* § 1 (1963).
4. *Id.*
5. Employees Mutual Casualty Co. v. Griffin, 46 N.C. App. 826, 266 S.E.2d 18 1980); 1 Strong's N.C. Index 3d, *Associations* § 2 (1977).
6. 6 Am. Jur. 2d, *Associations and Clubs* § 2 (1963).
7. *Id.* § 5.
8. *Id.* §§ 5, 8.
9. *Id.* §§ 12, 13.
10. *Id.* § 46.
11. *Id.* § 47.
12. *Id.* § 48.
13. See Wood & Ross, *supra* note 1, at 108.
14. *Id.* at 109.

Some states, like North Carolina, have laws or regulations that dictate how school activity funds shall be managed and controlled.[15] Many states require that school activity funds be audited each year.[16] North Carolina further requires that the local school board appoint a treasurer at each school to keep a complete record of all "special funds." These "special funds" must be deposited in an official school bank account on which only the principal and the treasurer may draw checks.[17] For North Carolina purposes, the term "special funds" is defined by means of illustrations as "funds realized from gate receipts from interscholastic athletic competition, sale of school annuals and newspapers and *dues of student organizations* [emphasis added]."[18]

In the absence of state statutes or regulations, some state courts have concluded that the funds raised by student clubs and other forms of extra-class activities are public or quasi-public funds subject to the supervision and control of local boards of education. One of the first important opinions addressing the management of extracurricular funds was *In re German Township School District.*[19] The school board in that case created a committee known as the Athletic Control Board (ACB) and authorized it to supervise and control the financing of extracurricular activities in the district. The committee's powers included the authority to deposit gate receipts in its own bank account and to spend those funds to purchase uniforms, supplies, and equipment. The gate receipts were never accounted for by the school treasurer or audited by the school district. A suit was filed against the board of education that challenged the board's delegation of authority over these activity funds to the ACB. The court concluded that while the board was authorized by the state law to adopt reasonable rules and regulations concerning the management of extracurricular funds, it could not delegate complete administrative and fiscal control over activity funds to a separate committee. As the court said:

> The language of this section in no sense serves to divorce the athletic and musical organizations of the high school from the other departments of the public schools. It cannot be construed as clothing a board of athletic control with supreme authority over the finances required to conduct these departments. The members of the band, who receive instructions in playing the various instruments used in such an organization, and who take part in the various exercises that takes place on the football field, particularly between the halves of the game, are as much a part of the student body as are those who specialize in intellectual achievements.[20]

The ruling in that case was affirmed several years later in another Pennsylvania opinion, *Petition of Auditors of Hatfield Township School District.*[21] The Hatfield School District allowed its schools to maintain a separate checking and savings account for activity funds under the sole control of the principal. These funds were "audited" by two board members but not by the external auditors who audited all tax funds of the district. Given the opportunity to review this procedure, the Pennsylvania court held:

> [It] is certainly true that, if a school district operates and expends tax money for the acquisition, maintenance or lighting of the playing fields, or for the services of a coach, the admissions charged result from the use of public property and from the expenditure of tax monies [and hence] are the property of the school district, must go into the official treasury thereof, and are subject to audit.[22]

No club has ever challenged the authority of local boards of education or local school officials to supervise its funds. Even though clubs are in a position to argue that they are separate legal entities and not school-sponsored and school-directed programs like the football team or school band, it would appear that by statute or common law, their funds are subject to supervision and fiscal control by the school district. But does the authority to manage, control, and audit club assets include the authority to decide how to spend them? The few court opinions on the subject are unclear.[23]

School clubs raise money in various ways, by a variety of means, and for a variety of purposes—i.e., field trips, outings, and specific projects—through voluntary contributions or assessments of their members. Most clubs also engage in fund-raising projects for the benefit of the club, the school, and/or local charities. However the money is raised, school clubs often have substantial cash assets.

The relationship between the school and the club with respect to the supervision and management of club funds is often described by reference to the law of trusts.[24] It is

15. *Id. See also* N.C. GEN. STAT. § 115C-448 (1983).

16. Wood & Ross, *supra* note 1, at 109. *See also* N.C. GEN. STAT. § 115C-447 (1983).

17. N.C. GEN. STAT. § 115C-448(a) (1983).

18. Fees for extracurricular activities have been allowed in some jurisdictions—Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264. S.E.2d 106 (1980); Granger v. Cascade School Dist., 499 P.2d 780 (Mont. 1972)—but not in others—Hartzell v. Connell, 186 Cal. Rptr. 852 (1982).

19. 46 D. & C. 564 (Pa. 1942).

20. *Id.*

21. 161 Pa. Sup. Ct. 388, 54 A.2d 833 (1947).

22. *Id.* at 836.

23. Wood & Ross, *supra* note 1. *See also* Stern, *supra* note 1, at 223-28.

24. Stern, *supra* note 1, at 225.

said that the equitable title to the money is retained by the organization that raised the funds and deposited them in school accounts, but legal title is held by the school. Under this analysis, the school district may be held to a fiduciary type of management standard for the sole benefit of the students in the club or organization.[25]

In *Betterson v. Stewart*,[26] a 1961 South Carolina case, the court was confronted with the allegation that a principal had misappropriated certain school activity funds that had been raised by students and parents and deposited in a school bank account under the principal's control. Citing the law of trusts, the court said:

> Having assumed the duty of administering the fund entrusted to him and admitting his duty to account, he (a principal) has the duty of rendering a full and accurate accounting of his administration thereof, showing a complete statement of his receipts, disbursement, and any balance remaining. 54 Am. Jur. Sections 497-498, pages 396-397.[27]

Lacking adequate information to render a decision, the court remanded the case to the lower court for an accounting of the school's activity fund. On remand, an accountant examined the school's books and financial records. Although he found the school's financial records poorly maintained, he concluded that all of the funds were spent for their intended purposes and that the principal never profited personally from the school fund.[28] The lower court dismissed the case, but the parents appealed again.

On rehearing, the South Carolina Supreme Court confirmed that the principal occupies the position of a trustee with respect to the activity funds, but it found that the evidence had not shown that this principal had spent any funds for other than their intended purposes, except that he had made a number of loans to teachers and other employees from the activity fund. It ruled that the principal had no right or authority to make such loans. However, the loans were made for small amounts, for brief periods of time, and had all been repaid.[29] While at first the principal made interest-free loans, he soon started charging interest on them. Although the making of the loans was clearly improper, the court refused to rule that the principal had misappropriated any funds, since he derived no personal benefit from these transactions.

A very similar situation arose in Mississippi in 1967 with a like result.[30] The principal in this case also was charged with misappropriating school funds. The record showed beyond question that he received money from students and school activities for one purpose and used it for another. For example, he received money from students

Who controls the management and expenditure of school clubs' funds?

to order caps and gowns but used these funds to purchase fans for the cafeteria. In fact, he had purchased more materials than he could pay for with the funds available.

In the court's opinion:

> One who is authorized to receive "activity funds" should make, as a minimum, at least some record of how much he receives, from whom, and for what purpose he receives it, to whom he paid the funds, and on what account. When a school principal buys books, class rings, class annuals, class pictures and other articles, and equipment for resale to students—or on order from the students—the sums paid by the students should be applied to that particular account payable and should not be applied to other school activities.[31]

Although the court clearly did not condone the principal's bookkeeping practices, it held that he was not guilty of misappropriating funds—for two reasons. First, the state had not established any rules or procedures for the proper administration of activities funds; second, in common law a public official is not personally liable for an unlawful payment of public funds if he acted in good faith within the scope of his authority.[32] It was obvious to the court, however, that some statutory restrictions or guidelines should be developed to limit the authority of a school principal in raising and spending funds.[33]

The Mississippi Supreme Court also dealt with the problem of a principal's making loans to school employees from

25. *Id.*
26. 121 S.E.2d 102 (S.C. 1961).
27. *Id.* at 104.
28. 140 S.E.2d 482 (S.C. 1965).
29. *Id.* at 486.
30. State v. Eakin, 203 So.2d 587 (Miss. 1967).
31. *Id.*
32. *Id.* at 589.
33. *Id.* at 590.

activity funds. The court held that a principal has no authority to lend the funds entrusted to him to a school employee. Using the language of the law of trusts, it stated: "The principal had no right to convert the funds belonging to others to a project of his own."[34]

North Carolina courts would not be so kind to the defendant principals in these cases. G.S. 14-92 makes it a Class H felony for any employee of an educational institution, or any person having or holding money in trust for any education institution, to "embezzle or otherwise willfully and corruptly use *or misapply the same for any purpose other than that for which such moneys or property is held . . .* [emphasis added]."

In 1978, the Supreme Court of North Carolina ruled that the words "willfully" and "corruptly," as they relate to the misapplication of funds under G.S. 14-92, respectively mean "done with an unlawful intent" and "the act of an official of fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others."[35] Among the acts that the court found to violate the statute was the loan of public funds to an employee to pay her rent and to finance a vacation.[36] In the Court's opinion, such purely personal uses had nothing to do with defraying the administrative expenses of the program for which the funds had been appropriated—that is, a program to aid the blind.[37]

Other acts allegedly committed by the defendant that could have been submitted to the jury for its determination of criminal intent included purchases of a gift for a state official, pumpkin pies for the staff at Thanksgiving, and Christmas decorations and food for an office party.[38] Whether or not a jury would convict the defendant of misapplying public funds intended to aid the blind by such acts, public officials should be aware that such acts are not, as a matter of law, free from judicial review.

The North Carolina Supreme Court also does not appear to accept the common law principle recognized in *State v. Eakin* that a public official who spends public funds in good faith within the scope of his authority is not personally liable for those expenditures. The North Carolina Court stated that even if "a supervisory board has knowledge of a subordinate's unlawful use of public moneys, . . . [that] does not excuse or justify one who knowingly misapplies such funds unlawfully."[39]

As a general rule, therefore, principals and other faculty advisers to school clubs should recognize that their role in the management, supervision, and control of club funds is similar to that of a trustee. If a club raises funds for a specific purpose (e.g., to donate funds to feed the hungry children in Africa) and that purpose is not unlawful or in violation of public or school board policy (that is, the money is not to be used to buy a keg of beer for a high school dance or for a similar disapproved purpose), the principal is not authorized to prohibit the club's expenditure of funds even if he believes the funds should be used for a different purpose. Finally, a club can require that the principal or school treasurer account for all the receipts and disbursements of the club's funds.

Capacity of School Clubs to Contract for Goods and Services

School clubs often contract for the purchase for goods and services. A club may hire a band or a disc jockey for a school dance, hoping to raise money for the performer's fee and the club from the admission charged; or it may purchase goods, on consignment, for resale in an effort to raise funds. Whatever the contractual arrangement may be, questions concerning the club's capacity to contract for the goods or services rarely arise in the negotiations. Fortunately, there have been very few lawsuits involving such contractual arrangements.

As indicated previously, a school club is an unincorporated association of students bound together for a common purpose. In North Carolina and other states, an association is merely an aggregate of its members. Since the majority—if not all—of a school club's members are unemancipated minors (that is, still legally dependent on their parent or guardian), they are incapable of contracting in many states by common law or statute.[40] In states like North Carolina, a minor's contracts are voidable at the option of the minor.[41]

Since the club's members (and hence the club) cannot be held liable on the contract,[42] the injured party in a breach-of-contract suit often seeks to hold some school official or

34. *Id.*
35. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).
36. *Id.* at 241 S.E.2d at 690-91.
37. *Id.*
38. *Id.*
39. *Id.*
40. Herbert v. Livingston Parish School Bd., 438 So.2d 1141 (La. App. 1st Cir. 1983).
41. 7 STRONG'S N.C. INDEX 3d, *Infants* § 2 (1977).
42. Fisher v. Taylor Motor Co., 249 N.C. 617, 107 S.E.2d 94 (North Carolina 1959).

the board of education bound to the contract. The results are mixed and depend almost entirely on an interpretation of state statutory law.

A lawsuit was filed against a Louisiana school board, a school principal, and the junior class adviser after the principal unilaterally canceled a disc jockey's contract to perform at a junior prom. The principal thought that a live band had been hired, and he felt that a disc jockey would be inappropriate for a prom even though the students had selected him rather than a band.[43]

The court quickly established that the junior class of a high school is merely an administrative classification of students who are unemancipated minors and by law are incapable of contracting.[44] Although the faculty adviser actually signed the contract as agent for the students, the court held that the students also were incapable of contracting through an agent. Thus it could not hold that the junior class was a party to the contract.

The disc jockey argued that the school board should be bound by the contract because it was signed by the board's employee, the faculty adviser. On this point, the court disagreed. The fact that one person is an employee of another does not make him an agent of the employer.[45] The court concluded, however, that the principal had reviewed and ratified the contract and, on the basis of a Louisiana statute, he was authorized to bind the school board. The statute reads in part as follows:

> The principal [is] appointed by . . . the school board . . . as the administrative officer of the school to which he is assigned. Consistent with the requirements of law . . ., he shall have administrative responsibility for the direction and supervision of the personnel and activities and the administration of the affairs of that school. [La. R.S. 17:414.1][46]

In addition, the principal's job description included the supervision and evaluation of the school's extracurricular program. The authority to sign contracts must be inferred as a requisite to his carrying out his administrative duties, the court said.[47] Thus the school board was held a party to the contract and could be held liable for its unilateral breach by the principal. The principal was not personally liable, however, since he was acting within the scope of his authority.

In North Carolina the above controversy might have had a different result. The State Court of Appeals recently ruled that neither a teacher nor a principal is authorized to bind the board of education to a contract made without the board's knowledge or consent.[48] The teacher in this case, acting as choral director, had agreed to purchase certain products for resale in an effort to raise funds to buy robes for the school chorus. Unfortunately, the teacher ceased his employment with the school system during the sale and not enough products were sold to pay for the items ordered and delivered. The principal paid for the merchandise that had been sold and returned the unsold merchandise to the supplier. The supplier sued for the money due on the original purchase order, claiming that it was not obliged to accept the return of the unsold goods. The trial court directed a verdict for the school board, and the supplier appealed.

In North Carolina, school officials are authorized to decide which types of school clubs may be established, including which specific organizations will be permitted. They may also regulate membership requirements and schedule club activities.

G.S. 115C-522 states that it is the local board of education's duty to purchase all supplies, equipment, and materials in accordance with contracts made by the Department of Administration. The statute further provides that no contracts shall be made for purchases unless the budget pro-

43. Herbert v. Livingston Parish School Bd., 438 So.2d 1141.
44. *Id.* at 1143.
45. *Id.* at 1144.
46. La. R.S. 17:414.1.
47. Herbert v. Livingston Parish School Bd., 438 So.2d at 1145.
48. Community Projects for Students v. Wilder, 70 N.C App. 182, 298 S.E.2d 434 (1982).

vides for their payment. In other words, only a board of education legally may contract for goods and services supplied to a North Carolina administrative unit.

It would appear, therefore, that suppliers of goods and services to North Carolina public schools and school clubs are in a vulnerable position if their contracts are not approved or ratified by the board of education. Fortunately, it would also appear that schools and school clubs are honoring their contracts in good faith even if the contracts are void or voidable by law.

In my opinion, the legal authority of school principals to contract for a school or for a school club as trustee should be clearly established in North Carolina law or local school board policy. A school or school club could not function efficiently, particularly in larger administrative units, if each contract or purchase order had to be approved by the board of education. If suppliers of goods and services to schools ever felt that their contracts with local school principals would not be honored and paid when due, they probably would no longer serve the schools—to the detriment of all concerned. When principals are authorized to execute contracts, they also should be required to adopt an annual school budget for the school's special funds and some method of fiscal control to safeguard the expenditure of special funds.

Tort Liability and School Clubs

There is no reported opinion involving a suit by an injured student against a school club, its officers, or individual members. In every case, the injured student has sued a faculty adviser, principal, superintendent, and/or the board of education. It appears that the "deep pocket" rule for selecting parties to a civil action is widely observed.

The issues that frequently arise in a tort claim involving a student club's extracurricular activities are (1) whether the school official owed the student a duty to supervise the activity; (2) if the school official did supervise the students' activity, whether the supervision was adequate; (3) whether the school official's acts or omissions were the proximate cause of the student's injury; and (4) whether the student's own negligence contributed to his or her injury.

The general rule is that a school district owes a student the same kind of care regardless of whether the student is engaged in a required curricular activity or an optional extracurricular activity.[49] Those duties include (1) to supervise the students adequately; (2) to instruct the students in how to use equipment or to perform tasks in a reasonably safe manner; (3) to maintain equipment, if any, in a safe condition; (4) to warn students of the foreseeable risks of injury or harm associated with a school activity; and (5) to provide first aid if an injury occurs.

In North Carolina and many other states the foreseeability of harm to pupils determines the extent of a teacher's duty to safeguard his or her pupils from dangerous acts of fellow pupils and other hazards that the teacher knows or reasonably should know exist.[50] As the North Carolina Court said:

> One is bound to anticipate and provide against what usually happens and what is likely to happen, but it would impose too great a responsibility to hold a defendant bound in a like manner to guard against what is unusual or unlikely to happen.[51]

An excellent application of these principles appears in *Rupp v. Bryant*,[52] a Florida Supreme Court decision involving a student who was seriously injured during a high school club initiation. The plaintiff alleged that it was well known that the Omega Club, a school-sanctioned organization, conducted activities that violated school board regulations. Because of this reputation, the school was supposed to monitor the club's activities closely. The club was required to obtain the principal's approval for any extracurricular outings, and it was instructed not to haze students at its initiation ceremonies. A faculty adviser was assigned to the club, and his presence was expected at all club activities.

In October 1975, the club held a meeting, unattended by the faculty adviser, at which it decided to conduct a hazing ceremony as part of its initiation. The adviser also was absent from the initiation ceremony at which, in the hazing, the plaintiff suffered a spinal cord injury that caused permanent paralysis from the neck down.

A primary issue in the case was whether, under the circumstances, school officials owed a duty to supervise the club's initiation ceremony. The court relied on two approaches in resolving this question. The first it referred to as the "Hohfeldian correlatives."[53] According to this axiom, "a correlative duty for supervision exists only to the extent that the school and its employees have the authority to control the behavior of a student." Under this analysis,

49. Stern, *supra* note 1, at 142-43. *See also* Annot., *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Caused by Acts of Fellow Students*, 36 A.L.R.3d 330 (1971).

50. James v. Charlotte/Mecklenburg Bd. of Educ., 60 N.C. App. 642, 300 S.E.2d 21 (North Carolina 1983).

51. *Id.*

52. 417 So.2d 658 (Fla. 1982). *See also* Corabba v. Anacortes School Dist. 103, 72 Wash. 2d 939, 435 P.2d 936 (1967).

53. Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 740 n. 96 (1959).

the court concluded that school officials had the authority to control the club's activities even if the initiation was held off campus; therefore, they had a duty to supervise the activity.

The second approach used was more pragmatic and socially oriented. It was grounded on the concept of foreseeability. As the court explained, the student has an interest in freedom from injury at school and school activities. Because the school sanctioned the Omega Club and appointed a faculty sponsor, it assumed supervision of and control over all club activities, an assumption on which the parents had a right to rely. In view of the club's reputation for violating the rules, the school clearly had a duty to supervise all of its activities. Having established that the faculty adviser was negligent in not attending the initiation, the court next had to determine whether his absence was the proximate cause of the student's injury. It noted that two standards have developed for resolving this question. The teacher's absence can be found to be the proximate cause of an injury only if the injury would not have happened in his presence[54] or if the students' misbehavior was reasonably foreseeable.[55]

In this case, the court found that the hazing of the plaintiff was foreseeable and would not have occurred had the teacher been present. It was reasonable to conclude, therefore, that the faculty adviser's absence was the proximate cause of the student's injury.

The standard of care to be met by a teacher increases in relationship to the foreseeable risk of injury or harm. In *De Gooyer v. Harkness*,[56] a high school coach actively participated in an initiation of a high school lettermen's club that was conducted in the school's gymnasium. As part of the initiation, each new member received an electric shock from a makeshift rheostat that was supposed to reduce the voltage of the current flowing from an ordinary wall socket. Something went wrong. A student received an excessive shock and died.

The court charged the coach with knowledge that electricity is inherently dangerous. If he permitted the electric shock treatment, he had a duty to use the highest degree of care that skill and vigilance could suggest. The crudeness of the rheostat used and the manner in which the electric shock was administered were sufficient to support the jury's findings of negligence: The initiates were required to lie on two bare wires spread along the gym floor with a glass of water on their chest and were told not to allow any water to spill from the glass when electrical current was allowed to pass through the wires. Naturally, many glasses were spilled, and the floor became increasingly wet as the initiation continued until the boy was electrocuted.

Who may be held liable in suits involving school clubs, their officers, and their individual members?

The contributory negligence of the injured student often can be pled as a defense to tort claims involving student clubs and their extracurricular activities, particularly in North Carolina.[57] For example, school officials in a Kentucky school district were found not liable for an 18-year-old's drowning on a class outing on the basis of the jury's finding that the student's own negligence contributed to his death.[58]

Before he approved the trip to the state park, the principal insisted that the student group arrange for a lifeguard to be present if they decided to swim. The school's athletic director, an excellent swimmer, agreed to supervise the students' swimming. Although the park's beach was not officially open and was posted with signs that read "Swim at your own risk," some students swam out to a diving tower that was posted "off limits." Apparently, the plaintiff had not brought his bathing suit. After cavorting in the shallow water in his street clothes, he too decided to swim out to the diving tower. He soon had trouble in the water.

When the students on the diving tower saw that that plaintiff was having difficulty, they called to a person in a boat nearby for help. A teacher who was on the shore, seeing the boat approach and being concerned about the hazard of the boat's moving that close to the swimmers—but also unaware of the plaintiff's predicament—waved the boat away. Shortly thereafter, the teacher and the athletic director were

54. Rupp v. Bryant, 417 So.2d at 668.
55. *Id.*
56. 13 N.W.2d 815 (S.D. 1944).
57. Izard v. Hickory City Bd. of Educ., 68 N.C. App. 625, 315 S.E.2d 756 (1984); Kiser v. Snyder, 21 N.C. App. 708, 205 S.E.2d 619 (1974).
58. Cox v. Barnes, 469 S.W.2d 61 (Ky. 1971). *See also* Rhea v. Grandview School Dist., 694 P.2d 666 (Wash. App. 1985).

told that the plaintiff had disappeared below the surface. The athletic director immediately entered the water in an effort to find and save the student. He was too late.

The plaintiff's attorney alleged that the two faculty supervisors were negligent in allowing the students to swim when the beach was closed, when no lifesaving equipment was available, and when neither was dressed for swimming. Despite these arguable errors in judgment, the jury concluded that an 18-year-old should have known the risks of swimming in street clothes in the early spring when the water was cold, and his negligence was a contributing factor in his death.

A similar conclusion was reached in *Armon v. Hafling*, a case involving a high school student who was hurt when a fellow student pushed him off a six-foot retaining wall into a stream during a club outing.[59] The student who pushed the plaintiff off the wall was named as a defendant initially, but he was dismissed from the suit before trial. At the trial's end, the court granted a directed verdict for the school officials named as defendants in the case on the grounds that high school students may be expected to be more responsible for their own acts and to require less supervision than elementary school students.[60]

Authority of School Officials to Regulate Clubs

In general, elementary and secondary school officials and institutions are authorized to regulate extracurricular activities, including school clubs, in order to prevent the time and interest of students from being too greatly diverted from their school work and otherwise to promote the welfare of students and the efficiency of the educational institution.[61] In some states, like North Carolina, the authority to regulate extracurricular activities is provided by statute.[62]

The authority to regulate extracurricular activities includes the authority to determine the type of clubs that will be sanctioned and whether certain specific clubs will be sponsored.[63] It also includes the authority to regulate membership requirements[64] and to schedule extracurricular activities.[65]

The first litigated test of a school board's authority to regulate and control student clubs concerned the prohibition of secret societies, fraternities, and sororities. It is now widely accepted that the prohibition of such student organizations is within school officials' lawful authority.[66]

The courts also have upheld school board policies prohibiting student religious clubs from meeting at public schools,[67] and it would appear that local policies prohibiting political clubs or organizations at the elementary and secondary level might also be upheld on the grounds that the schools are not a public forum for all manner of student organizations.[68] But if a school or school system sponsors one political or issues-oriented club, it may well have created a limited open forum and may not decline to sponsor clubs that reflect opposing points of view.[69] At least one court and a commentator believe that students have a First Amendment right to organize political clubs at school.[70]

Under the provisions of the Equal Access Act,

> It shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other content of the speech at such meetings.[71]

While there is some question whether the Act's prohibition of discrimination against student clubs on the basis of religion is constitutional, no one has seriously questioned the Act's prohibition of discrimination on the basis of the political, philosophical, or other content of the speech at club meetings. This portion of the Act greatly limits the authori-

59. 474 P.2d 638 (Colo. App. 1971).

60. *Id.* at 639.

61. 2 RAPP'S EDUCATION LAW § 8.07[5] (1984).

62. *Id.* § 8.07[1]; N.C. Gen. Stat. § 115C-47(4) (1983).

63. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 2067 (U.S. 7/24/84) (No. 83-3284).

64. 2 RAPP'S EDUCATION LAW § 8.07[2] (1984).

65. Student Members of the Playcrafters v. Board of Educ., 424 A.2d 1192 (N.J. Sup. Ct. App. Div. 1981). The court upheld a school board rule prohibiting activities on Friday evening.

66. E. REUTTER & R. HAMILTON, THE LAW OF PUBLIC EDUCATION 551 (2d ed. 1976); Waugh v. Board of Trustees of the Univ. of Miss., 237 U.S. 589 (1915); Hughes v. Caddo Parish School Bd., 57 F. Supp. 508 (W.D. La. 1944), *aff'd*, 323 U.S. 685 (1954); Coggins v. Board of Educ., 223 N.C. 763, 28 S.E.2d 527 (1944). *See also* N.C. GEN. STAT. § 14-12.2 *et seq.* (1981), which prohibits certain secret societies and makes certain activities of secret societies illegal.

67. Bender v. Williamsport Area School Dist., 741 F.2d 538; Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (Cir. 1982), *reh. denied*, 680 F.2d 424, *cert. denied*, 103 S. Ct. 800 (1983); Brandon v. Board of Educ., 487 F. Supp. 1219 (N.D. N.Y. 1980), 635 F.2d 971, *cert. denied*, Brandon v. Board of Educ. (1983), 454 U.S. 1123, 71 L.Ed.2d 109, 102 S.Ct. 970, *reh. denied*, Brandon v. Board of Educ. (1982), 455 U.S. 983, 71 L.Ed.2d 694, 102 S.Ct. 1493.

68. Bender v. Williamsport Area School Dist., 741 F.2d 538; Perry Educ. Assoc. v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983).

69. *Id. See also* Healy v. James, 408 U.S. 169 (1972).

70. Dixon v. Beresh, 301 F. Supp. 253 (E. D. Mich. 1973); Levy, *High School Political Clubs--A First Amendment Right*, 7 NOLPE SCHOOL L.J. 178 (1977).

71. Pub. Law No. 98-337, § 802(a), 98 STAT. 1302 (1984).

philosophical, or other content of the speech at club meetings. This portion of the Act greatly limits the authority of local boards of education to control the kind of student clubs allowed to meet at school.

There has been some concern expressed since the Equal Access Act was enacted about school officials' authority to prohibit clubs that have discriminatory membership policies. Before the Act passed, it was generally accepted that schools and colleges could deny sponsorship to clubs that discriminate on the basis in race of their membership requirements and could prohibit them from meeting at school. It is generally believed that the Equal Access Act does not affect local policies prohibiting racially discriminatory membership practices, since the Act does not require a school to sanction meetings that are otherwise unlawful.[72]

School policies prohibiting discrimination on the basis of handicap in the selection of club members are also lawful—and indeed are required by federal law and many state laws.[73]

While Title IX of the Education Amendments of 1971[74] generally prohibits sex discrimination in any program or activity that receives federal financial assistance, the law and its implementing regulations exempt the membership practices of certain organizations whose membership has traditionally been limited to persons of one sex, such as single-sex service clubs, YMCA and YWCA clubs, Boy Scouts, and Girl Scouts.[75]

Students have no constitutional or legal right to be selected for membership in a school club.[76] Participation is considered a privilege that may be extended or withdrawn at the discretion of the club or the school board.[77] However, eligibility requirements and restrictions should be rationally related to the purpose of the extracurricular activity involved.[78]

Once in a club, a student may be excluded for disciplinary or academic reasons, but the school may be required to afford procedural due process to the student before the exclusion. Since students have a significant interest in participating in a school club, a student's liberty or property interests may well be implicated in an expulsion from a school club and from all extracurricular activities.[79] The school or club should grant the student that minimal due process described in *Goss v. Lopez*.[80] That is, the student should be told the reason for the exclusion and should be given an opportunity to present his or her side of the story.

As in the area of tort liability, litigation concerning the selection or expulsion of club members inevitably involves the school board or school officials even though a club is arguably an unincorporated association, for students are minors and incapable of contracting even with one another to form a separate legal entity. Were it not for the sponsorship of the school, most if not all school clubs would not exist.

Hence, the law imposes a duty on school boards and school officials to maintain fiscal control over club finances, to ratify club contracts, to supervise club activities at which there is a foreseeable risk of harm, and to regulate club activities for the general welfare of students and the efficiency of the educational institution. ■

72. Pub. Law No. 98-377, § 802(d)(5), 98 STAT. 1303 (1988).

73. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (1982); The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400 *et seq.* (1982); Handicapped Persons Protection Act, N.C. GEN. STAT. 168A-1 *et seq.* (Supp. 1985).

74. 20 U.S.C. §§ 1681, 1682 (1982).

75. *Id.* § 1681(a)(6)(A); 34 C.F.R. 106.14(b).

76. 2 Rapp's Education Law § 8.07[2][a] (1984).

77. Marina v. Walters, 220 So.2d 802 (La. App. 1969); Karnstein v. Pewaukee School Bd., 557 F. Supp. 565 (E.D. Wis. 1983).

78. 2 RAPP'S EDUCATION LAW § 8.07[2], [6] (1984).

79. *Id.* § 8.07[4].

80. 419 U.S. 565 (1975).

The Duty of School Personnel to Report Suspected Abuse and Neglect

by Janet Mason
and L. Poindexter Watts

In fiscal year 1984-85, county social services departments in North Carolina received 19,301 reports about suspected abuse or neglect of children.[1] Educational personnel were the source of 3,110—over 16 per cent—of these reports.[2] Despite the educational community's obvious awareness of the duty to report suspected abuse or neglect, there is much confusion—in schools as well as among the general public—about the abuse and neglect laws, including the law that mandates reporting of suspected abuse or neglect. This article explains the statutory reporting requirement and related laws and attempts to address some of the primary sources of confusion for school personnel.[3]

The North Carolina Juvenile Code[4] includes a provision—commonly referred to as the "Child Abuse Reporting Law"—that requires anyone who suspects that a juvenile is abused or neglected to make a report:

> Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse or neglect and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give his name, address, and telephone number. . . .[5]

Companion statutes in the Juvenile Code set out the duties of the county social services director to whom the

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1. Division of Social Services, North Carolina Department of Human Resources, "Selected Statistical Data, Child Abuse & Neglect Central Registry, SFY 1984-85" (unpublished) (available from the Division of Social Services, Albemarle Building, 325 North Salisbury Street, Raleigh, N.C. 27611).

2. *Id.* Other reporting sources: anonymous—2,082; child-care providers—354; law enforcement/courts—1,450; medical personnel—1,873; relative—3,236; nonrelative—3,438; human services—2,013; victim—393; and parent—1,352.

3. The reporting law and questions relating to it are discussed in J. MASON, ABUSE AND NEGLECT OF CHILDREN AND DISABLED ADULTS: NORTH CAROLINA'S MANDATORY REPORTING LAWS (Institute of Government, 1984) (with 1985-86 Update). Juvenile court proceedings, which may flow from abuse and neglect reports, are discussed in Mason, *Juvenile Justice and North Carolina Schools*, 15 SCHOOL LAW BULLETIN 1, 13-22 (October 1984).

4. N.C. GEN. STAT. Ch. 7A, Subch. XI (G.S. 7A-516 to -744). The present Juvenile Code has been in effect since 1980. For a description of the background and main provisions of the 1980 Code, *see* Thomas, *Juvenile Justice in Transition--A New Juvenile Code for North Carolina*, 16 WAKE FOREST L. REV. 1-44 (February 1980).

5. N.C. GEN. STAT. § 7A-543 (1981).

report is made. The director is required to (1) initiate an investigation within specified time limits;[6] (2) give written notice of the result of the investigation to the person who made the report;[7] (3) take appropriate actions to protect the child;[8] and (4) report to the district attorney (a) if the investigation reveals evidence that a juvenile has been abused, or (b) if the report itself contains information indicating that a child has been the victim of any of several criminal offenses.[9]

While the terms "child abuse" and "child neglect" are commonly used in reference to the reporting law, it is significant that the legislature chose to frame the reporting requirement in terms of "abused juveniles" and "neglected juveniles." The Juvenile Code defines these and other key terms in fairly precise and somewhat special ways. To understand the reporting requirement, it is essential to look at certain applicable definitions:

(1) Abused Juveniles.—Any juvenile less than 18 years of age whose parent or other person responsible for his care:

a. Inflicts or allows to be inflicted upon the juvenile a physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, impairment of physical health or loss or impairment of function of any bodily organ; or

b. Creates or allows to be created a substantial risk of physical injury to the juvenile by other than accidental means which would be likely to cause death, disfigurement, impairment of physical health, or loss or impairment of the function of any bodily organ; or

c. Commits, permits, or encourages the commission of vaginal intercourse, any sexual act, the obscene or pornographic photographing, filming or depicting of a child in those acts for commercial or noncommercial usage, or any other offense against public morality and decency provided for in Article 26, Chapter 14 [G.S. 14-177 through -202.1, including such offenses as crime against nature, incest, employing or permitting a minor to assist in offenses involving obscenity, disseminating obscene materials to minors, sexual exploitation of a minor, and taking indecent liberties with children] by, with, or upon a juvenile in violation of law; commits, permits or encourages any act of prostitution with or by the juvenile; or

d. Creates or allows to becreated serious emotional damage to the juvenile and refuses to permit, provide for, or participate in treatment. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others; or

e. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile. [Delinquent acts are those that would be crimes if committed by an adult.]

. . . .

(5) Caretaker.—Any person other than a parent who is in care of a juvenile, including any blood relative, stepparent, foster parent, or house parent, cottage parent or other person supervising the juvenile in a child-care facility. "Caretaker" also means any adult person [present] with the approval of the care provider in a day-care plan or facility as defined in G.S. 110-86.

. . . .

(11) Custodian.—The person or agency that has been awarded legal custody of a juvenile by a court.

. . . .

(20) Juvenile.—Any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States. . . .

(21) Neglected Juvenile.—A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

. . . .[10]

6. *Id.* § 7A-544 (Supp. 1985). An investigation of alleged abuse must be initiated immediately but not more than 24 hours after the report is received. An investigation of alleged neglect must be initiated within 72 hours after the report is received.

7. *Id.* The notice must be given within five working days after the report is received unless a petition to take the matter to court is filed within that time, or unless the reporter waived his right to notification, or unless the reporter did not identify himself. The notice must inform the reporter that if he is dissatisfied with the social services director's decision, he has five working days within which to request that the district attorney review the decision.

8. *Id.*

9 *Id.* § 7A-548.

10. *Id.* § 7A-517. An administrative rule issued in 1985 by the State Social Services Commission expands the definition of "neglected child." The rule, 10 N.C.A.C. 41I .0303(2), provides as follows:

> A neglected child is also a disabled infant with a life-threatening condition from whom appropriate nutrition, hydration or medication is being withheld; a neglected child is also a disabled infant under one year of age with a life threatening condition from whom medically indicated treatment, which in the treating physician's reasonable medical judgment would be most likely to be effective in ameliorating or correcting such life threatening conditions, is being withheld, unless in the treating physician's reasonable medical judgment any of the following conditions exist:
>
> (a) [the] infant is chronically ill and irreversibly comatose; or
>
> (b) the provision of medical treatment would merely prolong dying, would not ameliorate or correct all of the life threatening conditions, or would otherwise be futile in terms of the survival of the infant; or

These definitions make it clear that the reporting law applies to abuse or neglect of anyone who is under age 18 and not married, emancipated (declared by a court to be free of parental control), or in the armed services. They also make clear that the abuse and neglect that must be reported include much more than physical harm. For instance, they include creating or allowing "a substantial risk of physical injury"; creating or allowing "serious emotional damage"; encouraging, directing, or approving the juvenile's commission of certain delinquent acts; failing to provide proper "care, supervision, or discipline"; and illegally placing a child "for care or adoption." In other respects, however, these definitions create an unfortunate degree of uncertainty about an area of the law that ought to be especially easy for everyone to understand.

Differences Between the Juvenile Code and Criminal Law Definitions

First, it must be noted that the reporting law is not a crime-reporting statute. (North Carolina law contains no general requirement that crimes be reported. An article by L. Poindexter Watts about the duty to report crimes will appear in the next issue of the *School Law Bulletin.*) The report must be made to the social services department, not a law enforcement agency. The required responses to the report and the court proceedings provided for by the Juvenile Code focus on protecting the juvenile, not on identifying and prosecuting the perpetrator. Child abuse is a crime, but it is the suspicion that a child is an "abused juvenile" or "neglected juvenile"—as defined in the Juvenile Code—that must be reported. The definition of "abused juveniles" covers many more situations than do the crimes of misdemeanor[11] and felony[12] child abuse. For starters, the criminal statutes apply only to offenses against children under age 16, while the reporting statute applies to "juveniles"—those under age 18 who are not married, emancipated, or in the armed services. A child who is the victim of the crime of child abuse is almost certainly also an "abused juvenile"[13] for purposes of the reporting law, but the definition of "abused juveniles" is much broader in scope than the crime of child abuse.

Next, in the entire realm of "neglect," the suspicion of which also must be reported, there is no parallel criminal statute. The definition of "neglected juvenile" does include some things—such as abandonment—that may also be criminal offenses. Furthermore, many instances of neglect and abuse will be covered under a criminal statute that is most often used in relation to delinquency but provides:

> Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile . . . to be in a place or condition, or to commit any act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7A-517 [the Juvenile Code's definitions] shall be guilty of a misdemeanor. . . .[14]

(c) the provision of medical treatment would be virtually futile in terms of the survival of the infant and under the circumstances the treatment would be inhumane.

The term "infant" means a child less than one year of age. The reference to less than one year of age shall not be construed to imply that treatment should be changed or discontinued when an infant reaches one year of age, or to affect or limit any other protection regarding medical neglect of children over one year of age.

The use in the regulation of the term "neglected child," instead of the Juvenile Code term "neglected juvenile," typifies the poor drafting that seems endemic to this whole area. The Juvenile Code is generally consistent in using the term "neglected juvenile" or "abused juvenile" when referring to a circumstance or condition addressed by the Code. The term "child abuse" could be meaningfully distinguished as referring to the criminal offenses of misdemeanor and felony child abuse. *See infra* notes 11 and 12. In fact, though, "child" instead of "juvenile" is frequently used in reference to Juvenile Code matters. *See, e.g.*, document cited in note 1, *supra*, and text following note 26, *infra*. Even the caption to G.S. 7A-543, the Juvenile Code reporting requirement, reads "Duty to report child abuse or neglect," even though the statute itself refers only to juveniles.

11. The criminal offense of misdemeanor child abuse is defined in G.S. 14-318.2 as follows:

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

. . . .

12. The criminal offense of felony child abuse is defined in G.S. 14-318.4 as follows:

(a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class H felony.

(a1) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child, who commits, permits, or encourages any act of prostitution with or by the juvenile is guilty of child abuse and shall be punished as a Class H felon.

(a2) Any parent or legal guardian of a child less than 16 years of age who commits or allows the commision of any sexual act upon a juvenile is guilty of a Class H felony.

. . . .

13. The crime of child abuse includes children who are not also "abused juveniles" only if the criminal statutes are interpreted to apply to a broader group of perpetrators—*i.e.*, only if the phrase "other person providing care to or supervision of a child" is read to include more people than the Juvenile Code language "other person responsible for his [the juvenile's] care." *See infra* note 20 and accompanying text.

14. N.C. GEN. STAT. § 14-316.1 (Supp. 1985).

Though the reporting statute covers more than these criminal statutes do, both the reporting law and the criminal child abuse laws cover a narrower group of children than those most people would consider to be abused. Criminal child abuse relates only to acts by the parent, guardian, or "other person providing care to or supervision of a child."[15] The term "abused juveniles," as used in the reporting law, includes only juveniles whose parents or other persons responsible for their care commit one of the acts set out in the Juvenile Code definition. Therefore, when a child has been harmed, the identity of the person who caused or allowed the harm is often the key determinant of whether the law requires that a report be made and whether the social services department must investigate after it receives a report.

Thus a child who is the victim of a crime committed by a third person is probably not an "abused juvenile" whose case must be reported to the social services department. It is important to remember, though, that such a child may be a "neglected juvenile" for purposes of the reporting law if the failure of the parent or other responsible person to provide adequate care and supervision contributed to his victimization. For example, if a child is raped by the mother's boyfriend, she may not be an "abused juvenile" as defined by the Juvenile Code because the boyfriend is not a parent or other person responsible for her care. But if the mother had failed to provide "proper care or supervision," or if the child was living in "an environment injurious to [her] welfare," she would be a "neglected juvenile" whose situation must be reported to the social services department. A child who is the victim of a crime may also *become* an "abused juvenile" or "neglected juvenile" in the language of the Code if his parent or other responsible person does not provide appropriate care or medical treatment in response to the child's victimization.

The reporting statute, then, requires a report not of the crime of child abuse or other crimes against children but rather of the broader—but in some respects narrower—situations in which a juvenile may be abused or neglected according to the Juvenile Code's definitions. In many such instances there will also be a crime against the child that has produced the condition of abuse or neglect. Although the Juvenile Code is not primarily concerned with responding to crimes, it acknowledges the importance of that aspect of situations in which children are harmed. The county social services department is under a specific duty to report to the district attorney any *evidence* it finds that a juvenile has been abused as defined in the Juvenile Code.[16] Often social services departments receive reports about children who have been the victims of crimes but do not come within the Juvenile Code definitions of abused or neglected juvenile. The department is not required to investigate those cases, but it must report to the district attorney any *information* it receives "that a juvenile has been physically harmed in violation of any criminal statute by any person other than the juvenile's parent or other person responsible for his care . . . ."[17]

Many people are surprised by the fact that the law requires a report to the social services department only when someone suspects that a child is an "abused juvenile" or "neglected juvenile" and it does not require anyone except a social services department to report child abuse or other crimes against children to law enforcement authorities. Although the General Assembly has not mandated such reports by the public, almost everyone would agree that a person who knows of such a crime should report it. Certainly schools should have policies that set out responsibilities and procedures for making such reports. Technically, a report about a crime against a child whose condition does not bring him within the Juvenile Code's definition of "abused juvenile" or "neglected juvenile" should be made to a law enforcement agency, not to a social services department. But as noted above, if a social services department receives a report about such a case, it is required to relay the information to the district attorney. Neither school personnel nor anyone else should struggle long in trying to figure out whether the case of a child who has been harmed comes within the Juvenile Code definitions, criminal law offenses, or both. The important thing is to report if there is even a suspicion that a juvenile is abused or neglected. If there is any doubt about to whom the report should be made, report to the county social services department. These points are amplified in "Guidelines for School Personnel" on pages 34-35.

Is Teacher Conduct Covered by the Reporting Law?

As noted above, the terms "abused juvenile" and "neglected juvenile" as used in the reporting law do not cover abuse and neglect—as those terms are ordinarily understood—by every person who may harm a child. The statute applies to the conduct of parents and other care providers.

15. *See supra* notes 11 and 12.

16. N.C. GEN. STAT. § 7A-548 (Supp. 1985).

17. *Id.*

The provisions concerning abuse speak of the "parent or other person responsible for his [the juvenile's] care."[18] The provisions concerning neglect refer to the "parent, guardian, custodian, or caretaker."[19] It is not clear why the two definitions use different phraseology in regard to the care providers whose conduct is covered. The context of the statute and the purposes of the Juvenile Code suggest that "other person responsible for his care" means at least guardian and "custodian" and probably also "caretaker." It is not clear whether the term includes others as well. In practice, social services personnel construe the two definitions to cover the same set of care providers—those set out in the definitions of "neglected juvenile" and "caretaker."[20] Because the definitions of "abused juvenile" and "neglected juvenile" were adopted at different times, there is little basis for reading any legislative intent into the use of different language. The difference is probably attributable to inartful drafting of the legislation.

If the two definitions are read to cover the same care providers, they do not appear to include school teachers, babysitters, or others with only temporary care responsibilities for juveniles. The emphasis is on parents and other parentlike persons who have on-going, long-term relationships with the child.[21] One important exception is that the statute explicitly defines "caretaker" to include day-care workers.[22] To date, the only basis for doubting that the definition excludes school teachers, babysitters, etc., is a recent North Carolina case in which a school administrator was convicted in district court for not reporting suspected sexual abuse of students by a substitute teacher.[23] Since the law would not require a report in that situation unless the substitute teacher was a "person responsible for [the juvenile's] care," apparently the prosecutor in the case and the judge who decided it viewed teachers as coming within that category. Since the conviction in that case was not appealed, this lower court ruling does not create any precedent—that is, it is not binding on other judges who may hear similar cases. The case does illustrate a critical area of uncertainty for school personnel in interpreting the reporting law.

Taking that case as a point of departure, it can be argued that the phrase "person responsible for his care" was used deliberately in the abuse definition to cover a broader range of abusive conduct than would be reportable if the covered perpetrators were confined to parents, guardians, "custodians," and "caretakers, " as they are in the neglect definition. Considering the extent to which teachers or babysitters may be "responsible for the care" of juveniles during large parts of a day, it is understandable that prosecutors might push for an interpretation that includes these people among the care providers covered by the abuse portion of the reporting law.

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18. *Id.* § 7A-517(1).

19. *Id.* § 7A-517(21). Part of the definition of "neglected juvenile" does not address who is responsible for the juvenile's condition, and it could be argued that in some cases the neglect involved could be caused by someone other than the primary care provider. The part in question defines as neglected a "juvenile who . . . is not provided necessary medical care or other remedial care recognized under State law . . . or who has been placed for care or adoption in violation of law." A court might restrict findings of neglect to cases in which basic care providers place a child illegally or fail to provide medical care, but it might just as easily find neglect when medical personnel, adoption personnel, or others are responsible. *See also* the rule regarding disabled infants who are denied medical treatment, *supra* note 10, in which the same issue could be raised concerning the conduct of involved medical personnel.

20. N.C. GEN. STAT. § 7A-517(5) (Supp. 1985). Addressing a county social services director's inquiry about the meaning of the term "caretaker," the North Carolina Attorney General wrote in 1981:

> . . . . With regard to abused and neglected children, . . . the Juvenile Code envision[s] that the State, acting through the county departments of social services and the district courts, will act to prevent and to protect children from physical or emotional injury or deprivation at the hands of those responsible for their care.
>
> Determination of exactly who falls within that group (i.e., those responsible for the care of children) to which the Code applies has been a matter of some discussion and difficulty since the inception of the Code. In practical effect, however, implementation of the Code's provisions has tended to limit and define that group.

Letter to Mr. David A. Noland, Director, Jackson County Department of Social Services, from Attorney General Rufus L. Edmisten, July 14, 1981 (unpublished). The letter assumes, as do most discussions of the question, that whatever "caretaker" means, it means the same thing as "person responsible for [a juvenile's] care."

A related question that this article will not address is whether the phrase "person providing care to or supervision of a child," which is used in the criminal child abuse statutes, means the same thing as either or both of the Juvenile Code terms "caretaker" and "person responsible for [the juvenile's] care." *See* notes 11, 12, and 13 *supra*.

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21. *See* Letter of the Attorney General, *supra* note 20, which states:

> The term ["caretaker"] does not include school teachers, because:
>
> (a) They do not have permanent or long-term responsibility for care and supervision of a particular child;
>
> (b) The definition of day-care facility appearing in G.S. 110-86(3) specifically excludes schools, among other institutions; and
>
> (c) School teachers have certain privileges with regard to supervision and disciplining of students, recognized in *State v. Pittard*, 45 N.C. App. 701, 263 S. E. 2d 809 (1980), which . . . [the statute] does not purport to abrogate.

22. While persons in day-care plans and facilities were added to the definition of "caretaker" in 1985, day-care workers were actually added to the Juvenile Code's coverage for reporting purposes in 1981 by an amendment to G.S. 7A-542.

23. *See* the summary of *State v. Freitag* in the Clearinghouse section of this *School Law Bulletin*, page 46.

On the other hand, the arguments for ruling that teachers and other temporary care providers are not covered in either the abuse or the neglect definition are perhaps stronger. The arguments are:

(1) The Juvenile Code, in which the reporting requirement appears, is designed primarily to ensure protective social services and court intervention on behalf of juveniles who are not receiving proper care and treatment from their parents or similarly responsible people.

(2) The dispositions available to the court in proceedings under the Juvenile Code relate to the juvenile's home situation and generally do not give the court authority to enter orders regarding schools, teachers, babysitters, etc.

(3) When a juvenile is mistreated by someone other than the parent or other primary caretaker, responsibility for protecting the child from further mistreatment and for meeting his special needs that result from the mistreatment rests with the parent, guardian, custodian, or caretaker.

(4) Protective intervention by a governmental agency is justified only when parents, guardians, etc., do not carry out their primary duties.

(5) Any governmental response to abuse by a school teacher should come from the school itself and from law enforcement agencies; but if the Juvenile Code is interpreted to require that abuse by a school teacher be reported, it also requires that the social services department investigate the report. This assumption of jurisdiction over schools is a step that neither social services departments nor the juvenile courts have taken in any large measure.

(6) The General Assembly, having specifically included day-care personnel within the definition of "caretaker," would have been equally explicit about including school personnel if it had intended for their acts to be covered by the reporting law, social services investigations, and other Juvenile Code provisions.[24]

As a matter of caution, knowing that one school official was prosecuted and convicted for not reporting suspected abuse by a teacher, school personnel may prefer to operate under the broader interpretation and report to the social services department any case of suspected abuse by a teacher or other school employee. It is important to understand, though, that if the county social services department is operating under the narrower interpretation, it will handle the report by merely conveying to the district attorney any information that suggests that a child has been physically harmed in violation of a criminal statute. In addition, despite the one case that has so caught school officials' attention, criminal prosecution for not reporting such a case to the social services department is extremely unlikely if school personnel make other appropriate responses—such as reporting directly to parents and law enforcement officials and assuring that children in the school are not exposed to further abuse.

Special Provisions Relating to School Personnel

The reporting requirement is universal. Anyone who "has cause to suspect" that a juvenile is abused or neglected must make a report. The duty falls on institutions[25] as well as on individuals. Thus schools as well as school personnel are clearly covered. The General Assembly apparently considers school personnel to have peculiarly important opportunities, abilities, and responsibilities in identifying and reporting juvenile abuse and neglect. It enacted a statute intended to pin the matter down with certainty:

> **§ 115C-400. School personnel to report child abuse.**
>
> Any person who has cause to suspect child abuse or neglect has a duty to report the case of the child to the Director of Social Services of the county, as provided in G.S. 7A-543 to 7A-552.[26]

Despite the statute's use of the phrase "child abuse or neglect," the cross-reference to the Juvenile Code's reporting provisions makes it clear that the requirement applies to "juveniles" and their abuse and neglect as defined in the Juvenile Code.

24 *See also* note 21 *supra*.

25. The term "institution" is defined by administrative rule, 10 N.C.A.C. 41I 0303(5), as follows:

> "Institution" means any public or private institution, facility, agency, group, organization, corporation or partnership employing, directing, assisting or providing its facilities to persons who, as a part of their usual responsibilities, give care or services to children less than 18 years of age and any hospital or other health care facility providing treatment to infants with life threatening conditions.

This definition was enacted at the same time as the rule expanding the definition of "neglected child" to include certain disabled infants who are denied treatment. *Supra* note 10. Thus the definition's emphasis on health-care facilities should not be interpreted as imposing a restrictive reading on the term "institution" as used in the reporting law.

26. N.C. GEN. STAT. § 115C-400 (1983).

Guidelines for School Personnel

It is no wonder that school personnel are often uncertain about what they should do about incidents of suspected child abuse or neglect involving children in their school. The statute that is generally known as the Child Abuse Reporting Law, while it clearly requires that school personnel report cases of suspected child abuse and neglect, contains language that almost invites misunderstanding. A recent case in which an assistant superintendent was convicted of violating the reporting law adds to the confusion about how that law should be interpreted.

The following material will describe the law briefly, explain some of the sources of confusion for school personnel, and make recommendations for policies that should be developed to guide school officials, teachers, and counselors in dealing with suspected child abuse and neglect.

The reporting law is set out in the North Carolina Juvenile Code—a group of laws that includes provisions for protective social work and civil court (as opposed to criminal court) proceedings for children who are "abused juveniles" or "neglected juveniles" according to the Code's definitions. The crimes of misdemeanor and felony child abuse are dealt with in the General Statutes chapter that covers crimes. That definition of child abuse differs from the Juvenile Code's definition of "abused juvenile," which is much broader. Thus the reporting law applies not only to children who are victims of the crime of child abuse but also to other children who come within the broader definitions of "abused juvenile" and "neglected juvenile." The reporting law requires all persons—school personnel and everyone else—who suspect that a juvenile is being abused or neglected to report their suspicions to the county department of social services. The social services department is required to investigate promptly, take steps to protect the child if the report is substantiated, and report possible criminal behavior to the district attorney. The law says that a "juvenile" is a child under 18 years of age who is not married, emancipated (that is, legally released from parental control), or in the armed services.

For purposes of the reporting law, "abuse" refers to the conduct of the child's *parent or other person responsible for his care* who inflicts physical or psychological damage to the child, or subjects him to major hazards to his health, or subjects him to sexual or obscene practices or exploitation, or encourages or directs him to commit delinquent acts involving moral turpitude. (Delinquent acts are acts that would be crimes if they were committed by an adult.) It also includes cases in which a parent or other person responsible for the child's care permits or allows these kinds of harm to the child. It is important to note that whether an act renders a child an "abused juvenile" whose case must be reported depends on whether the act was committed by the child's parent or someone else who is responsible for his care. There are crimes involving violent or immoral acts against children that do not come within this definition when they are committed by someone who does not have this special relationship with the child. Like all crimes, these offenses should be reported to law enforcement authorities.

A "neglected juvenile," for purposes of the reporting law, is a child who does not receive proper care, supervision, or discipline *from his parent, guardian, custodian, or caretaker.* A caretaker is defined as anyone other than a parent who "is in care of a juvenile," including blood relatives, stepparents, foster parents, house parents, and adults in day-care facilities. A child is also neglected if he is not provided necessary medical or remedial care, or if he is abandoned, or if he lives in an environment injurious to his welfare, or if he is placed illegally for care or adoption.

One area of uncertainty for the school community is whether the acts of teachers, principals, counselors, etc., are covered by the abuse and neglect statutes. That is, if a teacher commits against one of his or her students any of the acts listed in the abuse and neglect statutes, is that student an "abused juvenile" or "neglected juvenile" whose case must be reported to the social services department? Do teachers—or other school employees—have that special care-giving relationship that brings such incidents within the reporting law's mandate (over and above any moral obligation that citizens may have to report crimes)?

In general, the reporting law has been interpreted to exclude the acts of teachers from its coverage. That is, abuse of a child by a teacher is not an event that must be reported under the Juvenile Code's reporting provisions, because the teacher does not have the continuing care-giving responsibility contemplated by the statute. However, a trial court judge (in a case that was not appealed and is therefore not binding on other judges) recently ruled that the failure to report such an event is a misdemeanor. Responsible people will report such incidents to proper authorities even if the reporting law is not read to say that they must report them to the social services department.

Basic Rules for Reporting

1. If you *suspect* that a child is an "abused juvenile" or "neglected juvenile," as those terms are defined in the Juvenile Code, make a report to the county social services department.

2. If you are uncertain whether a child's situation comes within either of those definitions but you have a reasonable concern that it might, make a report to the county social services department.

3. If you know or suspect that a child has been the victim of a crime but you are sure that his situation does not come within the definition of "abused juvenile" or "neglected juvenile," notify the child's parent, guardian, custodian, or caretaker; notify law enforcement officials; or notify both, according to school policy.

4. If the school does not have a reporting policy, encourage the development of one. Meanwhile, for a particular case involving a crime against a child whose case clearly does not come within the Juvenile Code's definitions, consult school administrators and/or the school attorney if you are unsure of the appropriate response.

Policies and Procedures

Increasingly, schools and county social services departments in North Carolina are working together locally to develop policies and procedures for responding to cases of suspected abuse or neglect. Some considerations for developing local guidelines include:

1. Local guidelines should be developed jointly, not presented by one agency to the other.

2. If the guidelines provide—as many do—that the principal or some other designated person will receive reports from school personnel and communicate them to the social services department, it should be made absolutely clear that:

a. That liaison person's role is not to screen, investigate, or evaluate reports but rather to relay them immediately to the social services department; and
b. If an individual who suspects abuse or neglect has any doubt that his suspicion will be reported to the social services department by the designated person, he should make a report to the department himself.

3. Guidelines should provide for cooperative efforts to train school personnel in recognizing the symptoms of abuse and neglect and in understanding the law and social services procedures concerned with reports and investigations.

4. Guidelines should address cooperation between the school and the social services department during the investigation of a report of suspected abuse or neglect, whether the report originated with the school or not. They should:

a. Ensure that social services workers are allowed to interview children at school in appropriate cases.
b. Ensure that the school will not be used inappropriately as a site for interviewing children—that is, when the child could be seen at home but it is simply more convenient for the social worker to talk with him at school.
c. Provide for advance notice to the school, cooperative scheduling, appropriate sharing of information, and other steps to avoid disruption or confusion when an interview at the school is needed.
d. Acknowledge that the school is not required to notify the child's parents before allowing a social worker to interview the child at school, but specify conditions under which notification of the parents before or after an interview will be considered appropriate.
e. Address how decisions will be made about who—school personnel, parents, law enforcement officers, etc.—will be present during a social worker's interview with a child at the school. Decisions must be made on a case-by-case basis, but some general rules may be stated: The number of people should be kept to a necessary minimum. Allowing law enforcement officials or others to be present may be appropriate if it will avoid the child's having to undergo repeated interviews. If a law enforcement official is present, he or she preferably should not be uniformed. The parent or other person suspected of abusing or neglecting the child should not be present.
f. Guarantee an appropriate, private setting for the interview and procedures that will minimize embarrassment or disruption for the child.

5. Guidelines should also provide for appropriate follow-up and sharing of information within the constraints of legal confidentiality requirements.

6. The school or person who makes a report of suspected abuse or neglect is entitled by law to a written notice from the social services department within five days after a report is made, unless (i) the department has initiated court action within that time; (ii) the one who makes the report waives his right to receive the notice; or (iii) the one who reports does not identify himself. Guidelines should:

a. Provide that the school will receive notice even if court action is initiated within five days, since the school is not a party to such an action and has no way of knowing that the action is why it has not been notified; and
b. Describe any circumstances in which, or procedures through which, the right to written notice will be waived.

7. Guidelines should identify appropriate persons to be contacted and procedures to be followed if the school or the social services department is dissatisfied with the other's performance in relation to an abuse or neglect matter.

Local guidelines may address numerous other subjects, such as cooperative prevention efforts, curriculum development, coordination of services to the child and family, etc. In 1984, the State Departments of Human Resources and Public Instruction developed a set of recommended procedures to be used in cases of suspected abuse and neglect. These can serve as a useful starting point for local schools and social services departments that want to develop guidelines. See the Memorandum to All Local Superintendents from Craig Phillips, dated July 12, 1984 (available from the Department of Public Instruction or the Institute of Government). [The memorandum includes a list of relevant statutes and a copy of the North Carolina Attorney General's opinion dated April 27, 1984, which answers the following question in the affirmative: "May public school officials permit protective services workers of the county department of social services to interview a reported victim of child abuse or neglect on school premises in the absence of and without prior notice to the parent(s) of the reported victim?"]

Then, immediately following G.S. 115C-400, the legislature added another provision that raises a somewhat more complex issue:

> **§ 115C-401. School counseling inadmissible evidence.**
>
> Information given to a school counselor to enable him to render counseling services may be privileged as provided in G.S. 8-53.4.[27]

This statute's placement raises the question whether school counselors are subject to the reporting requirement contained in G.S. 115C-400. They clearly are! The explanation lies in the plain wording of the reporting statute and in the law governing what "privileged" means.

As a general rule, the State can compel anyone to testify in court concerning a relevant issue in a legal proceeding. That the testimony may be inconvenient, embarrassing, or disruptive of friendships or other relationships makes no difference. However, there are exceptions to this general rule. People in certain relationships expect their communications to be private and confidential. In some cases—such as counseling or psychotherapy—the relationship probably would not exist at all without some assurance of confidentiality. Because these relationships have a strong social value, the General Assembly has protected them by providing that a witness may not testify about such communications. The information shared in these special relationships is said to be "privileged," and it is protected by statute from disclosure in court. Examples of such testimonial privileges are the physician-patient privilege,[28] the clergyman-communicant privilege,[29] the husband-wife confidential-communication privilege,[30] the husband-wife marital-relationship privilege,[31] the psychologist-client privilege,[32] and the certified social worker-client privilege.[33] Another such privilege is the school counselor-student privilege. It is based on a statute that provides:

> **§ 8-53.4. School counselor privilege.**
>
> No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge.[34]

Note that the statute shields privileged information only from disclosure in courtroom testimony. It does *not* prohibit a school counselor from complying with the duty to report suspected juvenile abuse or neglect to the county social services director. Nor does it provide a counselor with any legal justification for not reporting such cases. Professional ethics may impose important limits on a school counselor's freedom to disclose student confidences,[35] but neither professional ethics nor the privilege statute overrides a school counselor's statutory duty to comply with the reporting law.

Once inside the courtroom, a testimonial privilege may be waived by the person who gives the confidential information.[36] Thus G.S. 8-53.4 states that the student may waive this privilege. Even if the child, under parental or other pressures, refuses to waive the privilege, the statute expressly provides that the judge may override the privilege "if in his opinion disclosure is necessary to a proper administration of justice." It is interesting to note that for two sets of testimonial privileges—the husband-wife privileges and the physician-patient privilege—the statutes explicitly state that the privileges do not apply in juvenile abuse or neglect proceedings.[37] Although there is no similar explicit statutory exception for the school counselor-student privilege, the judge's authority to override the privilege can serve the same purpose.

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27. *Id.* § 115C-401.
28. *Id.* § 8-53 (Supp. 1985).
29. *Id.* § 8-53.2 (1981).
30. *Id.* §§ 8-56, -57 (Supp. 1985).
31. *Id.*
32. *Id.* § 8-53.3
33. *Id.* § 8-53.7. This privilege applies only to a "person engaged in delivery of private social work services, duly certified pursuant to Chapter 90B of the General Statutes."
34. *Id.* § 8-53.4.
35. Professional ethics might also raise the question whether a counselor who gives a student an assurance of confidentiality should disclose to the student that he has a legal duty to report suspected abuse or neglect, since that constitutes an exception to confidentialty over which the counselor has no discretion.
36. The General Assembly has amended this aspect of the law on privileges pertaining to husbands and wives. The present general rule is that a spouse may be called to the witness stand, and the testifying spouse is free to testify or not. The privilege thus belongs to the testifying spouse rather than the spouse who communicated the information. And in certain types of criminal cases the privilege does not apply and the spouse on the witness stand can be forced to testify. *Id.* §§ 8-56, -57 (Supp. 1985).
37. *Id.* § 7A-551; *id.* §§ 8-53.1, -57.1 (1981).

Is Failure to Report Suspected Juvenile Abuse or Neglect a Crime?

As noted above, the recent criminal conviction of a school administrator for violating the reporting law has attracted attention and generated concern among school personnel. Another recent prosecution, of a psychologist, for not reporting suspected juvenile abuse is before the courts.[38] Thus, in addition to questions about the scope of the reporting duty, there is a question about how the failure to make a report becomes a criminal offense. Unlike many other states, North Carolina has no statute that explicitly provides that the failure to report suspected juvenile abuse or neglect is a crime. The General Assembly enacted the state's first mandatory reporting law in 1971 and has amended it several times, but it has never by statute provided for civil or criminal penalties for not making a required report. The Juvenile Code Revision Committee,[39] which drafted much of the present Juvenile Code, said in its 1979 report:

> The Committee considered a penalty for not reporting . . . to insure that the administrators of hospitals, schools, and other institutions whose employees may see evidence of abuse . . . [or] neglect develop a mechanism for reporting and encourage their employees to report such incidents as required by law. The Committee, however, concluded that the threat of civil suit for failure to report should be sufficient incentive for institutions to encourage reporting.[40]

How, then, did the criminal convictions come about? The answer lies in a common law rule—that is, a rule derived from English law and past decisions of appellate courts, in the reporting law itself, and in a catch-all criminal punishment statute. The courts have not often applied this common law rule, which received its clearest modern statement in cases that were decided in 1884, 1886, and 1947. In the first, a Mr. Parker was indicted under a statute that said that it was "unlawful" to sell or receive compensation for any spirituous or intoxicating liquors within 2½ miles of Zion Baptist Church in Cleveland County.[41] Parker argued that his conduct was not a crime, since the statute provided no penalty and similar statutes relating to such conduct in other counties specifically made the violation of those statutes a misdemeanor.[42] The State Supreme Court, upholding the conviction, said:

> If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. . . .[43]

In the second case, a New Hanover County farmer was indicted under a statute that said, "Every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high . . . ."[44] The statute did not say that the failure to build such a fence was either "unlawful" or punishable as a misdemeanor; it simply said that "[e]very planter shall . . . ." But the Supreme Court cited the language quoted above from the earlier case and stated that the failure to carry out the statute's mandate was an indictable offense.[45]

In the 1947 case the Supreme Court affirmed a conviction under a statute that provided that "[n]o person shall be required by any employer to become or remain a member of any labor union or labor organization as a condition of employment . . . ."[46] Rejecting the employer's argument that violation of the statute was not a criminal offense, the court cited the two cases described above and emphasized that (1) the statute's main purpose was the promotion of the public interest; (2) the statute dealt with public policy; (3) it was intended to promote the welfare of the whole public rather than to sow the seeds of private litigation; and (4) it was aimed at a practice that was detrimental to the public welfare.[47]

The relevant criminal punishment statute provides:

> [E]very person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court.[48]

38. This case was prosecuted in Durham County and resulted in a district court conviction that has been appealed to superior court. At this writing, the outcome of the case has not been determined.

39. The Juvenile Code Revision Committee was created by legislation in 1977 as an adjunct committee of the Governor's Crime Commission. Its charge included to "study problems relating to young people who come within the juvenile jurisdiction of the District Court" and to "study the existing laws, services, agencies and commissions and recommend whether they should be continued, amended, abolished or merged." N.C. GEN. STAT. § 143B-480(c)(6) (Supp. 1985).

40. "The Final Report of the Juvenile Code Revision Committee" (Raleigh, N.C.: North Carolina Department of Crime Control and Public Safety) January 1979, pp. 34-35.

41. State v. Parker, 91 N.C. 650, 651 (1884).

42. *Id.*

43. *Id.* at 651-52.

44. State v. Bloodworth, 94 N.C. 918, 919 (1886).

45. *Id.* at 920 (dictum). The case reversed the decision because of errors in the indictment and the jury's special verdict.

46. State v. Bishop, 228 N.C. 371 (1947).

47. *Id.* at 375.

48. N.C. GEN. STAT. § 14-3(a) (1981). The statute escalates a misdemeanor for which no specific punishment is provided to a felony if the offense is "infamous, done in secrecy and malice, or with deceit and intent to defraud." *Id.* § 14-3(b).

Thus, since the General Assembly has not said how to proceed when the reporting duty is violated, the common law rule provides the basis for characterizing the violation as a misdemeanor and the criminal statute, G.S. 14-3(a), establishes the range of possible punishments.

If prosecutors continue to use the common law theory successfully, its applicability to violations of the reporting law will certainly be tested in the appellate courts. The language of the cases cited above undoubtedly fits the juvenile abuse and neglect reporting requirement. If the issue is appealed, however, it can be argued that (1) the key question is one of legislative intent; (2) the General Assembly, if it considered the question at all, probably agreed with the Juvenile Code Revision Committee that the threat of civil liability precluded the need for criminal penalties for failing to report; and (3) if the General Assembly intended the failure to report juvenile abuse or neglect to be a crime, it would have said so explicitly in the statute. But if the appellate court were to find that the General Assembly simply stated a public rule and either failed to consider the matter of criminal penalty or ducked it as a political hot potato, the common law rule would prevail.

Conclusion

All school personnel are bound by the law's requirement that any person or institution who suspects that a juvenile is abused or neglected make a report to the county social services department. Because the reporting law applies to everyone, it should be as easy to understand as it appears on its face to be. But because the reporting requirement must be read along with the Juvenile Code's rather special definitions of "abused juvenile," "neglected juvenile," and "caretaker," it covers both more and less than a simple reading of the statutory mandate would suggest. This article has attempted to clarify some of the resulting confusion about what must be reported, especially in the context of schools. While stressing that any suspicion of juvenile abuse or neglect, as defined in the Juvenile Code, *must* be reported to the social services department, it has also tried to convey that there are matters outside the scope of the reporting law that school personnel certainly *should* report to parents, or to law enforcement officials, or both.

Even a careful reading of the reporting law and applicable definitions leaves an unfortunate ambiguity regarding some aspects of the duty to report suspected abuse or neglect. For school personnel, the most serious uncertainty is whether a teacher is either a "person responsible for [a juvenile's] care" or a "caretaker," so that a teacher's abuse or neglect of a juvenile must be reported to the social services department. The rule for school personnel, as for anyone else, should be "if in doubt, report." The law encourages this rule of thumb by providing immunity from civil or criminal liability to anyone who makes a report in good faith.[49] The immunity extends to cooperating in an investigation or testifying in court about an abuse or neglect matter.[50] The failure to report when a report is required, though, may result in criminal prosecution. ■

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49. *Id.* § 7A-550 (1981).
50. *Id.*

MEMO: The Proposed Repeal of Property Taxes and North Carolina Schools

LAST YEAR A PROPOSAL for a major restructuring of North Carolina's system for financing local government services, including the public schools, was introduced in the 1985 General Assembly. School officials will be interested in the following discussion of that proposal.

House Bill 1314 would repeal all property taxes and the current 1-cent and ½-cent local-option sales taxes. Revenue from those sources would be replaced by revenue from a constitutionally guaranteed statewide 5 per cent sales tax and half of all collections from the state corporate income tax. Revenue from those sources would be distributed to counties and municipalities, but not special districts, on a per capita basis. Two new taxes would be authorized for local governments. Counties and municipalities that lost revenue as a result of the bill would be authorized to levy a local income surtax on net taxable income, as computed on state income tax returns. Counties would be authorized to levy a real estate transfer tax of up to 8 per cent on sales of real estate. Revenue from that tax would be divided on a per capita basis among the county and municipal governments in the county.

The Institute of Government has written two reports that analyze the potential impact of House Bill 1314. At the request of the State Treasurer, the Institute analyzed the effects the bill would have (if it should be enacted and if the proposed constitutional amendment that is part of HB 1314 should be ratified by the voters) on (1) the ability of local governments to borrow money, (2) revenues of the state and local governments, (3) taxpayers, and (4) the structure and functions of local government. That report showed that there would be substantial differences in the effects on tax revenue of the various local government units and also substantial differences in the effects on taxes paid by individual taxpayers. There would also be a shift in taxes from municipal to nonmunicipal residents. A second report was submitted to the State Board of Education at the request of C. D. Spangler, Jr., who was chairman of that board when the request was made. That report reviewed some of the implications the bill would have for public school finance.

Although House Bill 1314 makes no reference to public schools, it would have several implications, both direct and indirect, for public school finance. First, the property tax would no longer be available as a source of supplemental revenue for schools in "city" school administrative units or other special school taxing districts. Only counties and municipalities would receive funds from the proposed statewide revenue sources. Special districts would receive no funds directly from the state.

Second, the bill would have widely differing effects on tax revenues of the 100 counties, and therefore the ability of the counties to support public schools from county tax revenues would vary considerably. In the Institute's analysis of the effects the bill would have had on local government revenue if it had been in effect during fiscal year 1984-85, 87 counties would have had net increases in tax revenue, and 13 counties would have had net reductions in tax revenue. However, the 13 counties that would have lost revenue under the bill accounted for 27.4 per cent of estimated statewide average daily membership in county schools in 1985-86 and for 40.5 per cent of total statewide local spending for current expense during fiscal year 1983-84. Furthermore, although most counties would have had substantial gains in tax revenue under the bill, 19 of the counties that would have gained revenue would have had net revenue gains of 20 per cent or less. Those counties, together with the counties that would have lost revenue, accounted for 44.3 per cent of average daily membership in 1985-86 and for 56.8 per cent of local spending in 1983-84.

Third, the bill would affect state tax revenues, which account for 64 per cent of total operating revenue for public schools. Under the bill, the state would lose half of all collections from the state corporate income tax (that amount would have equaled 5.6 per cent of total General Fund tax revenue in 1984-85). In addition, the state would have to bear the cost of providing a proposed sales tax credit for low-income residents. Those losses would be offset by revenue gains as a result of some indirect effects of the bill (e.g., items like farm equipment and industrial machinery that are now taxed at the state sales tax rate of 1 per cent would be taxed at 3 per cent under the new arrangement). It is not possible to ascertain the net effect of the various measures on state tax revenues.

Fourth, the bill would eliminate the use of local-option sales taxes to support public schools. The current ½-cent local-option sales tax, authorized in 1983 and now levied in 99 counties, would be repealed. Counties that levy that tax must use 40 per cent of the proceeds for school capital outlay or debt service during the first five years the tax is levied; they must use 30 per cent of the proceeds for that purpose during the second five years. Furthermore, the constitutional amendment proposed in the bill would prohibit the General Assembly from levying a local-option sales tax to benefit public schools.

Finally, the bill could affect the ability of counties to borrow money for school construction. The bill makes no provision for existing indebtedness—no provision is made for replacing property tax revenues as security for existing debt, and no revenue source would be provided directly to special districts to cover existing debt service requirements. The property tax would not be available to serve as security for full-faith-and-credit general obligation bonds. Although the legislature could authorize local governments to use other revenues—such as sales tax revenues—as security for bonds, the result might be a rise in interest costs. Also, the credit ratings of some governmental units, especially those that lost revenue under the bill, could be affected, and the bond rating agencies might look less favorably on local units that rely heavily on the relatively unstable sales tax for most of their tax revenue.

House Bill 1314 could be considered by the General Assembly during its June 1986 session, but only by a joint resolution passed by a two-thirds majority of those present and voting in the House and by a two-thirds vote of the Senate.

The Institute's report to the State Treasurer discusses many other far-reaching implications of HB 1314. Copies of that report are available for $5 plus 3 per cent sales tax (4½% in Orange County) from the Publications Office, Institute of Government, UNC-Chapel Hill, Chapel Hill, N.C. 27514. Copies of the report of the Board of Education are available free of charge from the Institute.—**Charles D. Liner** The author is an economist on the Institute faculty. His fields include school finance.

Clearinghouse

Edited by Laurie Mesibov

JUDGES MAY NOT OVERTURN A UNIVERSITY FACULTY'S DECISION ON THE ACADEMIC PERFORMANCE OF A STUDENT IF THE FACULTY HAS EXERCISED PROFESSIONAL JUDGMENT. *Regents of the University of Michigan v. Ewing*, 106 S.Ct. 507 (1985).

Facts: Scott Ewing was enrolled in a combined six-year undergraduate and medical degree program at the University of Michigan. In order to continue for the final two years of this program, students in mid-program must pass the NBME Part 1, a two-day written test administered by the National Board of Medical Examiners. Ewing was dismissed from the university after he had failed the test with the lowest score in the history of the program and after the faculty had reviewed his entire academic record. He was not allowed to retake the test, although the university had permitted all other students who had failed the exam to retake it. After unsuccessfully seeking readmission to the program and an opportunity to retake the exam, Ewing sued, claiming that he had a property interest in continued enrollment in the program and that his dismissal was arbitrary and capricious—a violation of his right to substantive due process. The district court found no violation; the Court of Appeals for the Sixth Circuit reversed and directed the university to allow Ewing to retake the exam and to reinstate him if he passed. The regents petitioned the United States Supreme Court to hear the case.

Holding: The Supreme Court reversed, holding that the university did not deprive Ewing of property without due process, even though it had always allowed students to retake the exam. Justice Stevens wrote that when judges are asked to review the substance of a genuinely academic decision, they should show great respect for the faculty's professional judgment. They may not override it unless it is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

The Court assumed (without deciding) that Ewing had a substantive property interest in continued enrollment free from arbitrary state action. However, the narrow avenue for judicial review defined by the Court precluded any finding that the decision to dismiss Ewing without permitting him to retake the exam was made arbitrarily. After Ewing's failure on the exam, it was reasonable for the faculty to re-examine his entire record, a record characterized by low grades, incompletes, and terms during which he was on an irregular or reduced course load. Dismissal was a reasonable academic decision made by the faculty judgment when viewed against the background of his entire career, including his score on the exam.

STATE FINANCIAL AID TO BLIND STUDENT ATTENDING A PRIVATE CHRISTIAN COLLEGE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE. *Witters v. Washington Department of Services for the Blind*, 106 S.Ct. 748 (1986).

Facts: Larry Witters applied in 1979 to the State of Washington's Commission for the Blind for financial assistance under a state vocational rehabilitation statute. Witters was attending a private Christian college and studying Bible ethics, speech, and church administration in preparation for a career as a pastor, missionary, or youth director. The commission denied Witters aid on the ground that aid to pursue religious training was prohibited by the state constitution. This ruling was upheld on administrative appeal and in a state superior court. The Washington Supreme Court affirmed but based its ruling on the establishment clause of the First Amendment, holding that the provision of aid would have the primary effect of advancing religion. The court explicitly reserved judgment on the state constitutional issue. Witters appealed.

Holding: The United States Supreme Court reversed and remanded. On the record, the provision of aid that Witters used for his education at the Christian college did not advance religion in an impermissible manner. Justice Marshall explained that the aid is not a direct subsidy to a religious institution but is paid directly to the student, who then

transmits it to the educational institution of his choice. The program creates no financial incentive for students who undertake a sectarian education. "Any aid ...that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choice of aid recipients," not from the state. The fact that Witters has chosen to use neutrally available state aid to help pay for his religious education does not create state endorsement of religion.

In applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), all parties agreed that the program had a secular purpose and thereby satisfied the first prong of the test. The Court also found that it satisfied the second prong, because the program did not have the primary effect of advancing religion. However, the record had not been sufficiently developed to permit a determination of whether the program fostered excessive entanglement between government and religion. The case was remanded to the Washington Supreme Court for either a fuller development of the factual record on that issue or a rehearing on whether the aid should be barred under the "far stricter" dictates of the state constitution.

Several concurring opinions stressed the applicability of *Meuller v. Allen*, 463 U.S. 388 (1983), which upheld the constitutionality of a Minnesota statute that provides tax deductions for certain educational expenses, even though the majority of the law's beneficiaries are parents of children who attend church-affiliated schools. In *Meuller* the Court found that a state program that is neutral in offering educational assistance to a class of individuals defined without reference to religion does not have the primary effect of advancing religion, because any aid to religion results from private choices of individuals.

PROFESSOR'S EXPECTATIONS DID NOT CREATE A PROPERTY INTEREST. *Sabet v. Eastern Virginia Medical Authority*, 775 F.2d 1266 (4th Cir. 1985).

Facts: When Dr. Sabet accepted a one-year appointment as assistant professor at Eastern Virginia Medical School (EVMS) in May 1977, she did not discuss the tenure policy but assumed that the school had adopted the policy recommended by the Association of American University Professors (AAUP). The AAUP policy provides a probationary period followed by permanent tenure that allows termination only for cause. EVMS's tenure policy, which was outlined in a faculty handbook in effect when Sabet was appointed, provided "tenure" only for the contractual period of employment. In 1978 Sabet learned of EVMS's policy and read the handbook. However, she believed that EVMS's consistent renewals of the contracts of faculty members who wished to stay at the school constituted a de facto tenure system based on AAUP guidelines. In 1978 she accepted a three-year appointment, and in 1981 her appointment was renewed for three years. In 1982 Sabet was informed that her contract would not be renewed because of budget reductions. She sued, claiming a violation of her due process rights and attaching a pendent state claim for fraudulent misrepresentation. The district court granted summary judgment for the defendants, and Sabet appealed.

Holding: The Court of Appeals for the Fourth Circuit affirmed. The due process clause protects against deprivation of property without constitutionally adequate procedures, but Sabet had no property interest in her employment beyond the term of her contract. Although a property right in public employment may arise from an informal understanding, no property right can be created unless the governmental employer is a party to the understanding. The record showed that EVMS had adopted its own tenure policy and never agreed to follow the AAUP guidelines. The school's consistent renewal of faculty contracts (always with explicit notice of the length of the appointment) over its nine years of operation was not sufficient to establish a de facto permanent tenure policy. Virginia law foreclosed her fraud claim. —*Trudy Ennis*

(Ms. Ennis is a second-year student at the University of North Carolina law school. She was a law clerk at the Institute of Government during the summer of 1985 and continues to work on the Clearinghouse.)

FEMALE PROFESSOR WAS NOT DISCRIMINATORILY DENIED PROMOTION AND EQUAL PAY. *Soble v. University of Maryland*, 778 F.2d 164 (4th Cir. 1985).

Facts: Rosalynde Soble, a tenured assistant professor at the University of Maryland, unsuccessfully sought promotion several times. In 1972 the chairman of the Department of Community Dentistry recommended her promotion to associate professor, but the university's chancellor denied the promotion because she did not have a Ph.D. After Soble received her doctorate, she again asked to be promoted. The new department chairman, Dr. Synder, gave her a favorable recommendation but did not provide the documentation required to support the recommendation. Soble learned from the committee that lack of support from Synder was the main reason it did not recommend promotion, and she filed a grievance against him. At the suggestion of the grievance committee, her request for promotion was reconsidered in January 1978. This time Synder supplied faculty recommendations and comments but recommended that Soble not be promoted. Again the promotions committee did not recommend promotion.

Soble filed complaints with the Equal Employment Opportunity Commission (EEOC), charging sex discrimination in wages and promotion and harassment for pursuing remedies. After Soble filed her first EEOC claim in 1979, Synder recommended promotion. The promotions committee, the dean of the dental school, and the chancellor supported the recommendation, but the university's president denied the promotion. Soble sued, alleging that she was discriminatorily denied a promotion and equal pay. The district court granted summary judgment for the university. The court reasoned that Soble's last request for promotion had been denied on legitimate grounds and thus she had received any relief due, even if the first two denials had been discriminatory.

Holding: The Fourth Circuit affirmed the result but rejected the trial court's rationale. Soble failed to rebut the president's conclusion, concerning her final request in 1979, that she was not qualified for promotion. Because there was no evidence that the president had discriminatory motives in denying that final request, the court reasoned that she had not been qualified for promotion at any time. Thus Soble had not met the *McDonnell Douglas/Burdine* requirement that a plaintiff prove she was qualified for a promotion before there can be a finding that a promotion was illegally denied. Analyzing Soble's claim that she received less pay than male assistant professors for comparable work, the court held that she did not rebut the University's evidence that her work was not substantially equal in skill, effort, and responsibility to that of her male counterparts.—*TE*

COLLEGE AND ITS TRUSTEES NOT LIABLE FOR ALLEGED VIOLATION OF INSTRUCTOR'S FIRST AMENDMENT RIGHTS. *Brockland v. Western Piedmont Community College,* No. 85-1013, slip op. (4th Cir. Jan. 9, 1986).

Facts: Brockland, a criminal justice instructor, was employed by Western Piedmont Community College from 1975 to 1982 under a series of one-year contracts. Brockland joined the American Federation of Teachers (AFT) in 1980 and began lobbying for the union. When his contract was not renewed in 1982, he sued the college and its trustees in their representative capacities. He alleged that the decision not to renew his contract resulted from his association with the AFT and thus violated his rights under the First Amendment of the United States Constitution. At trial, Brockland introduced the following evidence: (1) The president of the college, Mr. Richardson, and the supervisor of the criminal justice program, Mr. Boyd, warned him that association with the AFT would damage his chance for continued employment; (2) Boyd gave him a critical performance evaluation even though prior evaluations had been positive; and (3) Richardson recommended that the trustees terminate his employment. The judge denied the defendant's motion for a directed verdict at this stage in the trial because a jury could infer that the trustees acted with antiunion motives when they decided not to renew the contract. The defendants presented the following evidence to rebut that inference: (1) Nonrenewal was part of an overall reduction in faculty caused by financial restrictions; (2) the recommendation to reduce the criminal justice program resulted from a comprehensive review of all programs; (3) Brockland and one other instructor were the only nontenured employees in the criminal justice program; and (4) the trustees did not consider Brockland's union involvement. At this point, the trial judge directed a verdict for the defendants because Brockland did not rebut their evidence and show that the overall reduction was a pretext. Brockland appealed.

Holding: The Fourth Circuit affirmed, because under the decision in *Monell v. New York City Deptartment of Social Services* [436 U.S. 658 (1978)] the college or its trustees may not be held liable under the theory of respondeat superior for an employee's violation of 42 U.S.C. § 1983, the statute under which an individual who is deprived of a federal right may sue for damages. Under *Monell,* a governmental body may not be held liable "*solely* because it employs a tortfeasor." The college and its trustees in their representative capacities would be liable for depriving Brockland of his constitutional rights only if the alleged unconstitutional act "implement[ed] or execute[d] a . . . decision adopted and promulgated by their officers" or if the alleged violation stemmed from a "governmental 'custom' even though such a custom has not received formal approval through . . . official decisionmaking channels." There was no evidence that the college had a policy or custom of deterring union activity by punishing employees associated with the union. Also, the evidence was insufficient to support a finding that the college or its trustees were directly liable. No evidence indicated that the college, acting through its trustees, denied renewal of Brockland's contract because of his union activities or that the trustees were aware of warnings to him about the union. Instead, evidence indicated that they simply approved the president's general plan to reduce the size of the faculty and left the individual personnel decisions to him.—*TE*

[Editor's Note: Brockland filed a separate lawsuit against the president of the college and the supervisor of the criminal justice program. A jury found that his First Amendment rights had been violated and awarded him compensatory damages.]

ACHIEVEMENT GROUPING IN THE REGULAR CLASSROOM AND PLACEMENT IN EMR PROGRAMS IS NOT DISCRIMINATORY. *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403 (11th Cir. 1985).

Facts: Black students brought a class-action suit alleging that the use of achievement grouping in Georgia's public schools was intended to achieve, or resulted in, intraschool racial segregation, in violation of the U.S. Constitution, Title VI of the Civil Rights Act, and the Equal Education Opportunity Act (EEOA). The plaintiffs also claimed that black students were assigned to programs for educable mentally retarded (EMR) children in a discriminatory manner, in violation of the Constitution and Section 504 of the Rehabilitation Act of 1973. The court found no illegal discrimination under the federal Constitution or statutes and, relying on *Smith v. Robinson* [104 S.Ct. 3457 (1984); see 15 SCHOOL LAW BULL. 36 (October 1984)], dismissed the Section 504 action. The plaintiffs appealed.

Holding: The Eleventh Circuit affirmed the district court's decision in its entirety except the dismissal of the claim that the defendants violated Section 504 procedural regulations and misinterpreted the state guidelines for the use of I.Q. scores in placement of students. The court held that ability grouping per se and the procedures used to place students into regular classrooms or EMR programs do not violate the equal protection clause. Achievement grouping may be permissible even though it results in racial disparity (more blacks in lower-achievement and EMR classes than a random selection would indicate). The standard for determining the constitutionality of achievement grouping depends on whether the school district is "fully unitary" (that is, it has achieved "unitary status," which can occur only through a court order) or whether it is merely "unitary" (that is, it is not currently operating segregated schools). Ability grouping that has a significant disparate impact on black students may not be used at all unless the district has operated a unitary system for several years. The Georgia systems have been unitary since 1970-71, but since they had not been through the court procedure, they were not fully unitary. Challenges to ability placement in such systems may succeed without proof of discriminatory intent. Grouping is permissible in unitary districts if the assignments are not based on present results of past segregation or if the assignment will provide better education. The trial court found that ability grouping was designed to remedy results of past segregation by providing better education for black students.

Title VI, 42 U.S.C. § 2000d, prohibits discrimination based on race in any program or activity that receives federal financial assistance. The court applied a disparate-impact analysis to the Title VI claim but found no violation. The plaintiffs made a prima facie case based on the racial composition of the classrooms, but the defendants provided a substantial legitimate justification for their practice by proving that achievement grouping was an "educational necessity." Under Title VI, plaintiffs may prevail despite a substantial justification if they offer either an equally effective alternative practice that results in less racial disproportion or proof that legitimate practices are a pretext for discrimination. The court sustained the trial judge's finding that the plaintiff's alternative—random assignment and intraclass grouping—was not an equally sound alternative to ability grouping.

The court also applied a disparate-impact analysis to the special education claims. To make their prima facie case, the plaintiffs had to show that procedures for placement in EMR programs affected black students more harshly than other students. Although the plaintiffs did show that the percentage of black EMR students in the total black enrollment was larger than the percentage of white EMR students in the total white enrollment, the evidence indicated that procedural violations of state regulations occurred just as frequently when white students were evaluated as when black students were evaluated.

Evidence was also insufficient to establish a prima facie case of discrimination based on the districts' flexible use of I.Q. scores in placing students. The plaintiffs did not show that this practice affected black students more than white students. Practices that detrimentally affect all groups equally do not have a discriminatory effect.

The court did reverse and remand on the Section 504 claim, stating that EAHCA does not provide the exclusive means for raising the procedural violations found in this case. Section 504 relief that did not exceed relief available under EAHCA was available.

The plaintiffs' substantive claim of discrimination on the basis of handicap was grounded on alleged misplacement of nonhandicapped black students in EMR programs. The court found that the plaintiffs had not proved intentional discrimination or bad faith, as was required in order to substantiate this claim. A disparate-impact analysis could not be applied to these allegations, since the existence of readily discernible classifications of people is a prerequisite to this analysis. Here the proper identification of the classes themselves was at issue, making it impossible to examine the treatment of various groups adequately to determine whether they were treated differently.

PLAINTIFFS AWARDED ATTORNEYS' FEES IN CIVIL RIGHTS ACTION AGAINST UNC-CH. *Uzzell*

v. Friday, 618 F. Supp. 1222 (M.D.N.C. 1985) (memorandum opinion).

Facts: In 1978, students at The University of North Carolina at Chapel Hill (UNC-CH) claimed that three practices of the student government violated the Fourteenth Amendment, the Civil Rights Act of 1871 (42 U.S.C. § 1983), and Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d). They objected to (1) the subsidy of the Black Student Movement (BSM), which excluded white students until after the suit was filed; (2) the requirement that two minority-group students be appointed to the student government if two such students had not been elected; and (3) the requirement that students who appear before the honor court have the right to insist that a majority of the judges be of their race or sex. The trial court dismissed the last two claims and held that the claim relating to BSM was moot because the organization began admitting white students after the suit was filed [see 6 SCHOOL LAW BULL. 11 (October 1975)]. After a series of appeals that eventually went to the U.S. Supreme Court, the Fourth Circuit affirmed the holding relating to BSM but remanded the other two claims to the district court for trial. [See 8 SCHOOL LAW BULL. 13 (April 1977) and 10 SCHOOL LAW BULL. 14 (April 1979)]. In 1984 the district court held for the plaintiffs on the two claims. The plaintiffs then sought an award of attorney's fees.

Holding: Under 42 U.S.C. § 1988, the Board of Trustees of UNC-CH was ordered to pay the plaintiffs' attorneys' fees and expenses of $136,714.64. The plaintiffs were the prevailing party on all three claims—even the claim relating to BSM, since the lawsuit was a substantial factor in that organization's admission of white students. In determining the appropriate amount of fees, the court first established the "lodestar" (hours reasonably spent multiplied by a reasonable hourly rate set in accordance with prevailing market rates in the relevant community). Citing the quality of work, the novel and complex legal issues, and the successful results, the court accepted as reasonable a rate that exceeded the historic rate in the attorney's community. However, it reduced by 25 per cent the number of hours claimed because the time and specific nature of the work were not adequately documented in contemporaneous records. The court then adjusted the lodestar figure by considering other factors. It added 10 per cent to that figure because this case, taken on a contingency-fee basis, met the "exceptional circumstances" test of *Vaughns v. Board of Education of Prince George's County*, 770 F.2d 1244 (4th Cir. 1985) [see 16 SCHOOL LAW BULL. 26 (Summer 1985)]. The lawyer took a risk because, when the plaintiffs sued, *Regents of the University of California v. Bakke* [438 U.S. 265 (1978)], had not been decided, and there was little authority to support their claims. The risk was an exceptional circumstance because the attorney, a solo practitioner, invested time worth more than $12,000 a year over seven years without any guaranteed payment.

Another attorney who entered the case later in the proceedings and invested significantly less time was denied an increase in his lodestar figure because he did not incur the same risks even though he, too, accepted the case on a contingency basis. By the time he became involved, *Bakke* and other cases in support of the plaintiffs' position had been decided. His risk did not rise to the level of "exceptional circumstances."—*TE*

FINES COLLECTED FOR OVERTIME PARKING GO TO PUBLIC SCHOOLS AFTER CITY DEDUCTS REASONABLE EXPENSES OF COLLECTION. *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985).

Facts: The plaintiff brought a class action to compel the City of Asheville to pay into the Buncombe County School Fund all fines collected from people who parked overtime in violation of a city ordinance. Article IX, Section 7, of the North Carolina Constitution provides that "clear proceeds" of penalties, forfeitures, and fines collected for the breach of any state penal law belong to the county to use exclusively for maintaining public schools. The North Carolina Supreme Court had already determined that Article IX, Section 7, applies to civil penalties for overtime parking in *Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E.2d 258 (1980). The trial judge then ruled that "clear proceeds" include all the money collected—that is, the gross proceeds. The North Carolina Court of Appeals reversed and held that "clear proceeds" are net proceeds, thus allowing the city to deduct reasonable collection costs. *Cauble v. City of Asheville*, 66 N.C. App. 537, 311 S.E.2d 889 (1984) [see 15 SCHOOL LAW BULL. 37 (October 1984)]. The North Carolina Supreme Court granted the plaintiff's petition for discretionary review.

Holding: The Court affirmed, restating its former holding that money collected from violation of a city parking ordinance is a fine collected for the breach of a state penal law, even if the motorist has not been convicted of violating G.S. 14-4. The "clear proceeds" are to be paid to the county finance officer to distribute in accordance with G.S. 115C-437. In defining "clear proceeds," the Court held that the city may deduct the reasonable costs of collecting the fines but these costs do not include the costs of enforcing the ordinance. The Court refused to develop a formula to determine reasonable costs, stating that qualified accountants could resolve the question.

The Court noted that the 1985 General Assembly ratified "An Act to Classify Minor Traffic Offenses as Infractions

and to Provide a Procedure for the Disposition of Such Infractions by the Courts." G.S. 14-13.1 defines an infraction as "a non-criminal violation of law not punishable by imprisonment." G.S. 14-4(b) provides that a parking violation is an infraction and that the violator shall be required to pay a penalty not exceeding $50. The act—effective July 1, 1986—provides that "[t]he proceeds of penalties for infractions are payable to the county in which the infraction occurred for the use of the public schools." On July 17, 1985, the legislature amended G.S. 115C-437 to define "clear proceeds" as the full amount of all penalties, forfeitures, or fines collected, diminished by the actual costs of collection, not to exceed 10 per cent of the amount collected. This definition applies only to moneys collected from traffic violations that occur on or after July 17, 1985.—*TE*

DENIAL OF REAPPOINTMENT TO TEACHING POSITIONS DID NOT VIOLATE RIGHTS. *Pressman v. University of North Carolina at Charlotte*, 78. N.C. App. 296, 337 S.E.2d 644 (1985).

Facts: Herman was a visiting professor at the College of Architecture of The University of North Carolina at Charlotte (UNC-C). The university's code provides that the appointment of visiting faculty is only for the term of the contract and notice of nonreappointment is not required. Herman's contract also stated that his position was exempt from consideration for permanent tenure. Herman asked that he be considered for a tenure-track position, and the faculty review committee recommended that he receive an additional two-year appointment. While Hight, the dean of the College of Architecture, was considering such a reappointment, Herman participated in a faculty meeting at which he denigrated Hight's administrative competence. Hight denied the reappointment. Herman appealed this decision to the vice-chancellor of UNC-C, who also denied the reappointment.

Pressman was appointed for a four-year term as assistant professor of architecture subject to the tenure policies and procedures of UNC-C, which provide that before the end of the third year of his initial appointment, a faculty member is to be reviewed for reappointment, promotion, and/or permanent tenure. After reviewing Pressman's performance, the faculty review committee recommended against reappointment. Pressman appealed to the college review committee, which recommended reappointment. Dean Hight also recommended against reappointment but, according to Pressman, promised Pressman a final review during the fourth year of his appointment. The vice-chancellor denied Pressman's request for an additional review. During his employment, Pressman had been hospitalized twice for stress and depression, and this illness was considered during his evaluation. Pressman stated that he was cured and could function normally.

The two employees alleged several causes of action. Herman claimed that he was not reappointed because of his criticism of Hight's leadership and thus was denied his right to freedom of speech. Pressman claimed that he was denied employment because of his mental health handicap and that the failure to give him a final review was a breach of contract. Both employees claimed that the procedures followed by UNC-C violated the due process clause. The trial court granted summary judgment for the defendants, and the plaintiffs appealed.

Holding: The Court of Appeals affirmed. In reviewing Herman's First Amendment claim, the court explained that an employee's speech is protected only if it involves a matter of public concern. [See 17 SCHOOL LAW BULL. 8 (Winter 1986).] Herman's speech about the dean's lack of administrative competence was not a matter of public concern but rather the expression of a personal grievance concerning internal policy.

To sustain a due process claim, plaintiffs must show that they were deprived of a property interest in their employment. Because neither Herman nor Pressman was tenured, neither had a property interest in continued employment beyond the term of his contract. The procedural safeguards provided by UNC-CH exceeded the requirements of the due process clause.

In addressing Pressman's claim of discrimination based on a handicap, the court stated that while North Carolina laws do protect handicapped employees, including those with mental disabilities, Pressman was not covered by the statutes. In *Burgess v. Brewing Co.*, 298 N.C. 520, 254 S.E.2d 248 (1979), the State Supreme Court defined "disability" as "a present, non-correctible loss of function which substantially impairs a person's ability to function normally." Pressman was not a handicapped person because he stated that his mental illness was cured and he could function normally.

Pressman's breach of contract claim failed because the terms of the agreement for a final review were not fixed and did not create a binding contract.—*TE*

LETTER OF INTENT TO REHIRE DID NOT CREATE EMPLOYMENT CONTRACT. *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

Facts: Braun was a teacher from 1977 to 1983 under a series of one-year contracts at a private boarding school that was in severe financial trouble. On April 5, 1983, Mackey (the headmaster) wrote to Braun stating that he was "planning" for Braun to be on the faculty during the next year.

On May 6, 1983, Braun learned that he would not be rehired because of a new policy requiring that teachers have multiple certification. At Braun's request, Mackey wrote a highly favorable letter of recommendation but withdrew the letter when he learned that Braun planned to sue him and the school. Braun's tort claim alleged that defendants deceived him by stating that he would be rehired and that they withdrew the recommendation as reprisal for his seeking legal assistance. He also claimed breach of contract on the basis of the letter from Mackey. The trial court dismissed Braun's tort claim and granted a directed verdict for the defendants on the contract claim. Braun appealed.

Holding: The North Carolina Court of Appeals affirmed. No tort claim existed because Braun did not show that the defendants' conduct was fraudulent. The representation that he would be rehired for the next school year was not fraudulent because fraud cannot be based on a promise of future intent. Also, Braun did not claim that the defendants knew the representation was false or made the representation recklessly without regard for its truth. Removal of the letter of recommendation was not fraudulent because there was no misrepresentation of any fact. There had been no breach of contract because the letter did not contain the essential terms of the employment relationship.—*TE*

CONTRACTOR NOT LIABLE FOR LEAKY ROOF. *The Asheville School v. D. V. Ward Construction, Inc.*, 78 N.C. App. 594, 337 S.E.2d 659 (1985).

Facts. The school inspected and took possession of its new gymnasium on January 9, 1975. It soon discovered that the roof leaked and as early as November 18, 1975, communicated with the contractor who had built the gym about the problem. During 1976 and 1977, the contractor made periodic repairs to the roof because the leaks reappeared after each repair. The school finally spent $107,000 to replace the roof and on January 11, 1981, filed suit against the contractor. The complaint alleged breach of contract and defective construction in addition to negligent repairs. The court directed a verdict for the contractor on the issue of negligent repairs. After the jury awarded $107,000 to the school for breach of contract, the court entered judgment for the contractor despite the jury's verdict. The school appealed.

Holding: The North Carolina Court of Appeals affirmed. The court held that the school's breach of contract claim was barred by North Carolina's three-year statute of limitation, G.S. 1-52(1). G.S. 1-52(16) provides that an action for physical damage to property accrues once the damage "becomes apparent or ought reasonably to have become apparent." The school admitted that it knew as early as 1975 that the roof leaked. At that time the school had a duty to investigate the extent of the defect. The school argued that the contractor should be estopped from relying on the statute of limitations because, after each attempted repair, he assured the school that the roof was fine. The court rejected this argument, stating that the school had "slept on its rights" because recurring leaks provided ample evidence that the problem had not been corrected. The court affirmed the directed verdict for the contractor on the issue of negligent repairs because the school presented only evidence of damage that resulted from failure to construct the roof according to the original contract, not from negligent *repairs* to the roof. —*TE*

ASSISTANT SUPERINTENDENT CONVICTED FOR NOT REPORTING SUSPECTED CHILD ABUSE. *State v. Freitag* (Unreported, Wake County District Court, January 31, 1986).

Facts: Two eight-year-old girls were allegedly touched on their breasts, sides, and buttocks by a male substitute teacher while they were standing in line in the school cafeteria. The girls' parents were informed of the incident at the end of the school day. The Assistant Superintendent for Personnel of the Wake County School System, Dr. William Freitag, was contacted the same day at the direction of the school principal and given the details of the case. He was told that the parents did not blame the school system for the teacher's behavior and was led to believe the parents would be satisfied if they could be assured the teacher would be removed from the classroom.

Dr. Freitag told the local school officials that he would handle the situation and that the parents should call him if they had any questions. The next workday, Dr. Freitag notified all schools in the system to remove the teacher from the substitute list. He did not report the case as the law requires (G.S. 7A-543 provides that suspected child abuse shall be reported to the county social services department) because he believed that, while improper, the teacher's actions did not constitute child abuse.

The case was ultimately reported to the district attorney's office by the mother of one of the students. Dr. Freitag alone was charged with failure to report suspected child abuse in violation of G.S. 7A-543.

Holding: After a two-day trial, Dr. Freitag was found guilty. The defense first argued that G.S. 7A-543 is not a criminal statute, that the legislature intentionally omitted the language necessary to make failure to report a misdemeanor. Freitag's attorney also argued that as head of the personnel department, Freitag was not the administrator with primary responsibility for or experience with child-abuse issues. In addition, he noted that if Dr. Freitag was guilty of violating the reporting statutes, the same would be true

for all the school officals with knowledge of the incident, as well as the parents of the second child.

The district court judge was unpersuaded by the defense arguments. Responding to the claim that others also had a duty to report, the judge held that on the basis of the evidence presented, Dr. Freitag was guilty of a misdemeanor for failure to report suspected child abuse. Dr. Freitag was fined $100.

An alternative argument not forcefully made at trial is that (a) the reporting statute does not apply to incidents involving perpetrators who are not "caretakers" of the child, and (b) school teachers do not fit within the definition of caretakers outlined in the child-abuse reporting statutes [see G.S. 7A-517(5)]. Interestingly, this view is generally shared by social service departments across the state—*Ann L. Majestic.*

(Ms. Majestic is a member of the law firm of Tharrington, Smith & Hargrove in Raleigh.)

ONLY STUDENTS DOMICILED IN A SCHOOL SYSTEM HAVE A RIGHT TO ATTEND THE SCHOOLS OF THAT SYSTEM. *Formal Attorney General's Opinion,* December 18, 1985.

Questions:

1. Which school system does a student have a right to attend?
2. Whose domicile determines the system that a student has a right to attend?
3. May a local board of education enroll a student who does not have a right to attend its schools?
4. If a board refuses to enroll such a student, are the student's constitutional rights violated?
5. What process, if any, is due a pupil in determining whether he is domiciled in the school district?

Opinion:

1. Only those persons domiciled in a school system have a right to attend the schools of that system. Under G.S. 115C-366, residence alone is not enough. A person has domicile at a place if (a) he has abandoned his prior home, (b) has a present intent to make that place his home, and (c) has no present intention to leave the place [*Lloyd v. Babb,* 296 N.C. 416, 251 S.E.2d 843 (1979)]. The fact that a person may move to a place with a plan to leave after an anticipated event occurs does not preclude him from acquiring domicile, if he intends to make that place his home "for the time at least." But if a move is only temporary and the person maintains a fixed intention to return to his permanent home, domicile is not established. G.S. 115C-140.1 and 366.2 create an exception to this rule for certain children n foster or group homes and for students, employees, and faculty of colleges or universities and for visiting scholars at the National Humanities Center. A person can establish domicile for school purposes as soon as he moves into a school district; no waiting period is necessary.

2. For an unemancipated minor, the domicile of his parents, surviving parent, or guardian controls for purposes of the student's entitlement to enroll in school. A minor may not establish a domicile different from that of his parents, surviving parent, or guardian unless he is emancipated. A student may establish his own domicile when he is eighteen years old. "Guardian" means a guardian appointed for a minor in accordance with G.S. Ch. 33. If either parent is living and capable of caring for the child, a guardian may not be appointed for the purpose of conferring on a child a right to attend a school in a district where the parent is not domiciled, absent unusual circumstances.

3. A local board of education has discretionary authority to enroll a student domiciled within the state but outside the boundaries of the school district only if the board of education of the administrative unit where the student is domiciled and the board of the unit where he wants to enroll agree in writing [G.S. 115C-366(a)]. The agreement may provide for payment of tuition and may include other reasonable terms and conditions. A local board of education has discretionary authority under G.S. 115C-366.1 to enroll students domiciled outside the state. If a board chooses to enroll these students, it may charge tuition and impose other reasonable conditions. One condition that probably should be imposed is that an adult within the system, through a guardianship or otherwise, must agree to assume responsibility for the student.

4. A local board of education that denies enrollment to students who are not domiciled in the system does not violate the students' constitutional rights. Residency requirements for enrollment in public schools were upheld in *Martinez v. Bynum,* 461 U.S. 321 (1983); the Court stated that "at the very least a school student generally would be justified in requiring school-age children or their parents to satisfy the traditional, basic residence requirement—i.e., to live in the district with a bona fide [present] intention of remaining there—before it treated them as residents." The definition of residence in *Martinez* is virtually identical to the definition of "domicile" in this opinion, and decisions under G.S. 115C-366 that apply this definition are constitutional. But a local board of education that, by policy or practice, bases decisions on the enrollment of nondomiciliaries on race, sex, religion, national origin, or handicap would likely violate both the federal and state constitutions and laws.

5. Our statutes do not mandate procedures for determining whether a person is entitled to attend school within a particular school system. If a student is denied enrollment on the basis of his domicile, he has a right of appeal under G.S. 115C-45(c), but only if he establishes a prima facie case

of domiciliary status by showing that he, his parent, or guardian is a resident of the school district. If a hearing before the board of education is held, the minimal requirements of due process will have been met, if not exceeded.

COMMUNITY COLLEGE BOARD OF TRUSTEES HAS POWER TO REMOVE ONE OF ITS MEMBERS. *Formal Attorney General's Opinion,* December 1, 1985.

Question: Does the board of trustees of a community college have the power to remove one of its members and to adopt a policy that provides for removal for failure to attend meetings?

Opinion: Yes, the board has this authority. G.S. 115D-19 delegates to the board of trustees of a community college the power to remove a board member by a two-thirds vote after determining that he "is not capable of discharging, or is not discharging, the duties of his office as required by law or regulation..." Repeated absences from meetings would constitute sufficient neglect of the duties imposed by G.S. 115D-20 to permit removal from office. The board of trustees sets the number of absences sufficient to justify removal, but that number must be excessive and the absences without adequate excuse.—*TE*

CHANGES IN THE FAIR LABOR STANDARDS ACT. *Formal Attorney General's Opinion,* January 3, 1986.

Question: How will Pub. Law No. 99-150, which amends the Fair Labor Standards Act (FLSA), affect the public schools?

Opinion: Although April 15, 1986, is the deadline for the Secretary of Labor to adopt regulations to implement the amendments, general effects of the changes are reasonably certain.

1. Local boards of education were not liable for overtime compensation until April 15, 1986. This indicates that schools that are now paying overtime may stop doing so until that date. However, Congress apparently intended to prohibit schools from recovering any prior overtime payments.

2. Because the fiscal year runs from July to June, schools may—for this one year only—delay overtime payment until August 1 for work performed after April 14.

3. After April 14 schools must compensate employees for work that exceeds 40 hours per week, but they may choose either to pay overtime at the rate of 1½ times the regular rate of pay or to provide compensatory time at the rate of 1½ hours off for each overtime hour worked. Local boards should adopt policies setting our their decision to pay overtime to all employees, or to provide compensatory time to all employees, or to pay certain categories of employees and provide compensatory time for others. The board may also set limitations on the use of compensatory time.

4. Employees may accrue up to 240 hours of compensatory time (160 hours of overtime worked); if they accumulate more, they must be paid overtime wages for the additional overtime hours. Employees must be allowed to take compensatory time within a reasonable period after requesting it, if that can be done without undue disruption to the operations of the school system. Compensatory time can accrue indefinitely, and an employee must be compensated for any unused time when he leaves the system.

5. Only "employees," not "volunteers," are covered by the FLSA. Volunteers are private citizens who volunteer to provide services to public schools and employees of public schools who volunteer to provides services to the school system that are not the same type of services the individual is employed to perform. A private citizen who volunteers is not an employee even if he is paid expenses, reasonable benefits, or a nominal fee for the services. Apparently this is also true for school employees. Persons who are employed by one governmental agency and volunteer to perform services for another governmental agency are also exempt from the FSLA in their volunteer capacity.

6. If a school employee undertakes—on an occasional or sporadic basis and solely at his option—part-time employment for the school that is in a different capacity from his regular employment, the part-time hours are not included in the calculation of overtime hours accruing from his regular employment.

7. If schools employ off-duty law enforcement officers to provide security at school activities, those hours are not counted in calculation of overtime by the law enforcement agency. —*TE*

[See also 17 SCHOOL LAW BULL. 1 (Winter 1986) for a discussion of schools and the new FLSA requirements.]

LOCAL BOARDS OF EDUCATION MAY ADOPT INTERLOCAL AGREEMENTS TO CREATE A SELF-INSURANCE TRUST. *Formal Attorney General's Opinion,* February 5, 1986.

Question: Does Article 20, G.S. Chapter 160A, permit local boards of education to make agreements to establish and fund a self-insurance progam?

Opinion: Yes, local boards are authorized to make interlocal agreements to establish an insurance trust if the contracts establishing the self-insurance program comply with G.S. 160A-464 and G.S. 115C-42 and -43. The collective power of local boards to act in this regard is probably no greater than the power of an individual board. Therefore, G.S. 115-43(b) requires that the agreement prohibit payment

of claims based on "actual fraud, corruption or actual malice" of a board, board member, or employee. Also, under G.S. 115C-43(c) the agreement must require (1) that the local board receive notice of the claim before it is settled and (2) that the local board adopt and make public a policy concerning defense and payment of civil claims and criminal charges against its members or employees. The portion of the proposed plan that establishes a pool of money to pay claims against a local board, board members, or employees is governed by G.S. 115C-43, which does not require approval by the Commissioner of Insurance. However, the provision that requires the trust to purchase insurance to protect against claims greater than the pooled amount is governed by G.S. 115C-42, which requires that the insurance be purchased from a company licensed in North Carolina or approved by the Insurance Commissioner.—*TE*

A BOARD OF EDUCATION MUST FOLLOW STATUTORY PROCEDURES WHEN IT LEASES ITS REAL PROPERTY. *Informal Attorney General's Opinion,* December 4, 1985.

Question: What procedures must a board of education follow in order to lease its real property?

Opinion: A board must follow the procedures and limitations of G.S. 115C-518 and G.S. 160A-272, -274, and -277.

1. The board must first determine that the property is "unnecessary or undesirable for public school purposes" for the term of the proposed lease. This determination should be recorded in the board's minutes.

2. The board must then offer to lease the property to the board of commissioners of the county in which the property is located. The property may be offered at a fair market price or at a price negotiated between the two boards. The board of education may lease the property to the county commissioners for no consideration.

3. If the board of county commissioners does not lease the property, the board of education may then lease it for a maximum of ten years, including periods that may be added to the original term by options to renew or extend. The term of the lease may not be longer than the term offered to the county commissioners. Although the amount of rent and other conditions of the lease are determined by the board, the board may not lease property—even to a nonprofit corporation—for less than the property's reasonable market value. It may lease property without consideration only to governmental units.

4. Before making any lease, the board must give ten days' notice by publication; the notice must describe the property, state the annual lease payments, and announce the board's intention to authorize the lease at its next regular meeting.

5. The proceeds of the lease, if it runs longer than one year, must be applied to reduce the county's bonded indebtedness for the school administrative unit that leases the property or for capital outlay purposes.

RELEASE OF STUDENT DIRECTORY INFORMATION TO MILITARY RECRUITERS. *Informal Attorney General's Opinion,* October 22, 1985.

Question: Do North Carolina laws permit, require, or prohibit the release of directory information (name, address, and telephone number) by public and private high schools, community colleges, and universities to military recruiters?

Opinion: Boards of education for public elementary and secondary schools that receive federal financial aid may release directory information to military recruiters if they follow the procedural requirements outlined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. The decision concerning release of the directory information is discretionary unless the information has previously been released. If directory information has been released to a group or organization for recruiting or career purposes, G.S. 115C-47(26) requires that it be released to military recruiters. If the decision is discretionary, school boards should consider Pub. Law No. 96-342, 94 Stat. 1083 (1980): "It is the sense of Congress...that it is appropriate for [secondary educational] institutions to release to the Armed forces information regarding students at such institutions...which is relevant to recruiting individuals for services in the Armed Forces."

The provisions of FERPA that govern the release of directory information by public elementary and secondary schools also apply to public community colleges and universities.

No state statutes govern access to directory information about students at private educational institutions. Private schools that receive federal financial assistance are covered by FERPA. If a private school does not receive federal assistance, it has total discretion in deciding whether to release information to recruiters.—*TE* ■

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